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In The

Supreme Court of the United States

October Term, 1995

TAWANDA DINKINS, Personal Representative of the Estate of STEPHANIE AMBER DINKINS, Deceased,

Petitioner,

vs.

HUTZEL HOSPITAL, a Michigan Non-Profit Corporation, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where the trial court refused to instruct the jury on petitioner's claims that survived a motion for judgment as a matter of law; where the trial court, in response to petitioner's motion for a new trial, erroneously stated petitioner's claims had been dismissed; where the trial court failed to apply the law of the circuit interpreting 42 U.S.C. § 1395dd(a) of the Emergency Medical Treatment and Labor Act; and where, on appeal, the Court of Appeals erroneously proceeded as though petitioner's claims had been dismissed, overlooked or ignored relevant record evidence that supported petitioner's claims, failed to apply state substantive law to petitioner's state claims, and sanctioned the actions of the trial court by affirming his rulings, did the decision of the Court of Appeals constitute a gross departure from accepted and usual judicial proceedings, which deprived petitioner of her right to a trial by jury and her right to procedural due process?

II. Where the circuit courts of appeals have rendered conflicting decisions interpreting 42 U.S.C. § 1395dd(a) of the Emergency Medical Treatment and Labor Act, which requires hospital emergency departments to provide "appropriate medical screening" to their patients, does an emergency department violate the Act (1) only when, as a result of a discriminatory motive, the hospital fails to provide a patient with the same medical screening it would have provided to the usual paying patient, as held by the Sixth Circuit; (2) whenever it fails to treat a patient in accordance with its established screening procedures, regardless of motive, as held by the D.C. Circuit, the Eighth Circuit, and the Eleventh Circuit; or (3) whenever it fails to develop and utilize screening procedures which enable its examining physicians to determine whether acute or severe symptoms represent a life-threatening condition, as held by the First and Ninth Circuits?

LIST OF PARTIES

The parties are petitioner, Tawanda Dinkins, Personal Representative of the Estate of Stephanie Amber Dinkins, Deceased, the appellant in the circuit court; and respondents, Hutzel Hospital, Inc. and Children's Hospital of Michigan, Inc., the appellees in the circuit court.

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The opinion of the United States Court of Appeals for the Sixth Circuit is unreported (App. B).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on January 30, 1996. A timely petition for rehearing en banc was denied by order filed March 22, 1996 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1395dd(a):

> **§ 1395dd. Examination and treatment for emergency medical conditions and women in labor**
>
> **(a) Medical screening requirement.** In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this title [42 USCS §§ 1395 et seq.]) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency

department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.

* * *

42 U.S.C. § 1395(e)(1)(A):

(e) Definitions. In this section:

(1) The term "emergency medical condition" means —

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in —

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part;

* * *

STATEMENT OF THE CASE

A. Background

Beginning in 1977 and continuing through September of 1986, Hutzel Hospital, in collaboration with the Sickle Cell Detection and Information Program, Inc. ("the Sickle Cell Program"), conducted sickle cell disease screening on all newborns delivered at the Hospital.[1] As part of this screening program, the Hospital took blood specimens from the umbilical cords of its newborns and forwarded the specimens to the Sickle Cell Program, along with information identifying the patient and the pediatrician or obstetrician to be notified in the event of a positive test result.

This case arises out of the death of Stephanie Dinkins three years after her birth at Hutzel Hospital. Although Stephanie tested positive for sickle cell disease at the time of her birth, neither Hutzel Hospital nor the Sickle Cell Program notified petitioner or Stephanie's physician of the positive test result. As a consequence of this omission, Stephanie did not receive the medical treatment necessary to save her life.

On September 25, 1986, when petitioner, Tawanda Dinkins, entered Hutzel Hospital to give birth to her daughter, Stephanie, she was required to sign a Consent for Admission form and a Release of Treatment Information form. (App. N, 64a) The Consent for Admission authorized Hutzel Hospital to take blood specimens and to perform such diagnostic testing as it deemed necessary. The Release of Treatment Information authorized the

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1. Sickle cell disease is an inherited genetic disorder which affects the structure and function of red blood cells. The most common problem associated with sickle cell disease is an increased susceptibility to infection. In the United States, sickle cell disease is limited almost exclusively to African Americans.

Hospital to release medical records to any follow-up physician. Neither form specifically mentioned sickle cell disease screening or any other diagnostic test. It was petitioner's expectation that she and her physicians would be notified of any abnormal blood test results.

On September 30, 1986, Hutzel Hospital took a blood specimen from Stephanie Dinkins and forwarded it to the Sickle Cell Program for analysis. Although the specimen tested positive for sickle cell S-C disease, Hutzel Hospital neither requested nor obtained the test result and the Sickle Cell Program never notified petitioner or Stephanie's physician that Stephanie had tested positive for sickle cell disease. More than three years later, on June 9, 1990, Stephanie developed a high fever and other flu-like symptoms. Still unaware her daughter had sickle cell disease, petitioner took Stephanie to the emergency room of Children's Hospital of Michigan, where she was evaluated by an emergency medicine physician, Stephen Knazik, D.O. Following his examination, Dr. Knazik diagnosed Stephanie's condition as an ear infection and discharged her home. Less than 24 hours after her discharge from the hospital, Stephanie died of an overwhelming infection, secondary to her sickle cell disease.

B. Pre-Trial Proceedings

The civil action in this case was filed on May 31, 1991, in the Circuit Court for the County of Wayne, a Michigan state court of general jurisdiction. The original complaint asserted common law claims of medical negligence against Hutzel Hospital, Children's Hospital of Michigan and Stephanie's pediatrician. On February 7, 1992, petitioner was granted leave to file her First Amended Complaint. In addition to claims of common law medical negligence, petitioner's First Amended Complaint alleged that Children's Hospital of Michigan violated 42 U.S.C. § 1395dd(a), *et seq.*, by discharging Stephanie without proper treatment and without stabilizing her condition.

On February 13, 1992, defendant Children's Hospital of Michigan filed a Notice of Removal, reflecting the removal of this case to the United States District Court for the Eastern District of Michigan, Southern Division. Federal jurisdiction was based on 42 U.S.C. § 1395dd, *et seq.*, raised in petitioner's First Amended Complaint. Following removal, petitioner was granted leave to add the Sickle Cell Program to this litigation as a party defendant.

C. Trial Proceedings

1. Petitioner's Claims

On February 16, 1994, the trial court signed a Joint Final Pre-Trial Order, setting forth the issues to be litigated. Petitioner's claims against Hutzel Hospital included allegations of both active negligence and vicarious liability. Petitioner alleged Hutzel Hospital negligently failed to ascertain the results of Stephanie's sickle cell disease screening test and failed to communicate the positive results of that test to petitioner or her physicians. Petitioner also alleged that the Sickle Cell Program was an actual or apparent agent of Hutzel Hospital for the purpose of conducting newborn sickle cell disease testing. Petitioner claimed that, as a consequence of this agency relationship, Hutzel Hospital was vicariously liable for the Sickle Cell Program's negligent failure to communicate the positive sickle cell test results to petitioner or her physicians. (App. O, 71a-72a)

With respect to petitioner's claims against Children's Hospital of Michigan, the Joint Final Pre-trial Order set forth petitioner's claims that Dr. Knazik failed to take an adequate medical history and failed to conduct appropriate diagnostic tests in order to properly evaluate Stephanie's condition. Petitioner also claimed the Hospital violated 42 U.S.C. § 1395dd(a) by discharging Stephanie home without initiating

its standard protocol for the treatment of children with sickle cell disease. (App. O, 72a-73a)

2. *Evidentiary Support For Petitioner's Claims Against Hutzel Hospital*

i. Professional Negligence

At trial, petitioner relied on the testimony of Bertram Lubin, M.D., a pediatric hematologist, to support her claim of professional negligence against Hutzel Hospital. Dr. Lubin, an expert on sickle cell disease, had himself directed a sickle cell disease screening program of the type conducted at Hutzel Hospital. According to Dr. Lubin, Hutzel Hospital was required to develop a specific protocol for notifying parents and health care providers of the sickle cell test results. In addition, Dr. Lubin stated Hutzel Hospital had an obligation to convene an institutional review board to pass upon the adequacy of its notification procedures. Dr. Lubin testified that the Hutzel Hospital sickle cell screening program did not meet these standards. (App. M, 58a-60a)

Dr. Lubin also testified that whenever a hospital undertakes to conduct patient testing that does not involve the immediate implementation of patient care, the hospital has a responsibility to inform the patient that the testing is being done, and to advise the patient how the test results will be conveyed. He testified unequivocally that Hutzel Hospital had an obligation to obtain the sickle cell disease test results of Stephanie Dinkins. Finally, Dr. Lubin explained that even when a hospital sends a blood specimen to an outside laboratory for testing, the hospital has an obligation to ensure that a procedure is in place to notify patients and their physicians of the test results. It was Dr. Lubin's opinion that Hutzel Hospital's failure to meet these applicable standards of care was a proximate cause of Stephanie's death. (App. M, 60a; 62a-63a)

ii. Vicarious Liability

In support of her vicarious liability claims against Hutzel Hospital, petitioner relied in part upon the testimony of Charles F. Whitten, M.D., the director of the Sickle Cell Program.[2] According to Dr. Whitten, the Sickle Cell Program had no direct contact with Hutzel Hospital patients who were screened for sickle cell disease. Hutzel Hospital drew the blood and provided the Sickle Cell Program with the relevant patient and physician information. Although Hutzel Hospital never requested or obtained Stephanie's sickle cell disease test result, Dr. Whitten testified he was prepared to comply with any reasonable request made by Hutzel Hospital regarding notification of test results. (App. K, 51a-55a)

Dr. Whitten also testified that the sickle cell disease screening program at Hutzel Hospital required patient consent. Significantly, such consent was deemed obtained when the patient signed Hutzel Hospital's general consent form. On this point, Dr. Whitten explained that when a Hutzel Hospital patient consented to routine hospital care, that consent was considered adequate to include sickle cell disease screening. He testified that sickle cell disease screening was **a reasonable and appropriate part of patient care at Hutzel Hospital.** (App. K, 51a-55a)

In further support of her claim that the Sickle Cell Program was the agent of Hutzel Hospital for purposes of conducting sickle cell disease screening, petitioner introduced into evidence

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2. During pretrial discovery, Hutzel Hospital denied having any recollection of the creation or implementation of the sickle cell screening program at the Hospital. Consequently, no employees of Hutzel Hospital testified regarding the relationship between the Hospital and the Sickle Cell Program. The testimony of Dr. Whitten was, therefore, unrebutted.

and read to the jury, Hutzel Hospital's responses to written interrogatories. In those responses, Hutzel Hospital admitted it drew blood from Stephanie Dinkins for the purpose of sickle cell testing. The Hospital also admitted this was done as part of its routine sickle cell testing of all black newborns. (App. H, 36a)

3. Evidentiary Support For Petitioner's Claims Against Children's Hospital Under 42 U.S.C. § 1395dd(a)

At trial, Dr. Knazik testified that when Stephanie presented to the emergency room of Children's Hospital, he had no knowledge of her sickle cell disease status. However, he was aware that a child with sickle cell disease and a high fever could die within 24 hours without immediate and proper treatment. (App. J, 44a) In fact, Children's Hospital of Michigan had a written emergency room protocol for treating children with sickle cell disease and a high fever. The hospital's *Protocol for Emergency Room Treatment of Patients with Sickle Cell Disease and Fever* required that children under six years of age with sickle cell disease and a temperature of at least 38[5] (Stephanie's temperature was 39[6]) receive intravenous Cefuroxine, an antibiotic. (App. L, 56a) According to Dr. Knazik, if he had known that Stephanie had sickle cell disease, he would have treated her in accordance with the hospital protocol.

When questioned about the Hospital's screening procedures, Dr. Knazik admitted that when the sickle cell disease status of an ill child was unknown, hospital procedure required him to determine whether or not the child had sickle cell disease. Dr. Knazik stated he accomplished this by "taking an adequate history, as well as by doing a physical examination". (App. J, 46a) However, while conceding a family history of sickle cell was important historical information, he admitted that he did not ask petitioner whether there was a history of sickle cell disease or sickle cell trait in Stephanie's family.[3] Furthermore,

3. To inherit sickle cell disease, an individual must receive a recessive (Cont'd)

although Dr. Knazik claimed that the patient's ongoing medical history was a "more sensitive marker" of sickle cell disease, he admitted that, within the population of children with sickle cell disease, more than 50% would have had no hospital contact at all by the time they reached Stephanie's age of three and a half years old. (App. J, 44a; 46a-47a) Reluctantly, Dr. Knazik admitted the physical examination he performed and the historical questions he asked were not designed specifically to elicit information regarding sickle cell disease. (App. J, 50a)

Dr. Knazik also admitted he did not order a "sickle cell prep test." This is a preliminary test designed for use in the emergency room. A negative test result rules out sickle cell disease. A positive test result confirms the presence of sickle trait and the possibility of sickle cell disease. Dr. Knazik testified that if a child of unknown sickle cell disease status and a high fever had a positive sickle cell prep test in June of 1990, he would have initiated the Hospital's sickle cell disease protocol pending confirmation of sickle cell disease. (App. J, 44a-48a) Since the sickle cell prep test was never ordered, Dr. Knazik discharged Stephanie home, where she died less than 24 hours later.

From the testimony of Dr. Knazik, a jury reasonably could have concluded that Dr. Knazik failed to conduct "appropriate medical screening" to determine whether Stephanie required intravenous antibiotics, as specified in the Hospital's sickle cell disease treatment protocol. Coupled with Dr. Lubin's testimony

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(Cont'd)

sickle cell gene from each parent. Individuals who receive a recessive sickle cell gene from only one parent have "sickle cell trait". These individuals have no manifestations of sickle cell disease. Like sickle cell disease, sickle cell trait can be identified by an appropriate screening test. Petitioner testified that if she had been asked, she would have informed Dr. Knazik that Stephanie's father did have sickle cell trait. She had no knowledge as to whether she carried the sickle cell trait.

that initiation of this sickle cell disease protocol would have saved Stephanie's life (App. M, 61a-62a), the testimony of Dr. Knazik created a question of fact for the jury as to whether or not Stephanie was properly screened within the meaning of 42 U.S.C. § 1395dd.

4. Defendants' Motions For Judgment As A Matter Of Law

i. Hutzel Hospital

At the close of petitioner's proofs, Hutzel Hospital moved for a judgment as a matter of law as to all of petitioner's claims. With respect to petitioner's claim that the Sickle Cell Program was the agent of Hutzel Hospital for purposes of performing sickle cell screening, Hutzel Hospital argued it had no control over the Sickle Cell Program. In rejecting this argument, the trial court specifically found that the Hospital's admission that it conducted sickle cell disease screening as a routine procedure created a question of fact as to whether an agency relationship existed between the Hospital and the Sickle Cell Program.[4] After

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4. The Court: Hutzel answered an interrogatory which said blood was drawn and it was drawn as a routine testing of black newborns. And the answer to that was yes. And then it said see Dr. Whitten for the details.

I read that as allowing an inference that Dr. Whitten and his program was the agent for Hutzel in the routine testing of newborns for sickle cell.

* * *

[Y]ou can argue that he wasn't. But I'm not going to find, as a matter of law, he wasn't, in the face of that unqualified admission that Hutzel routinely tested newborns for sickle cell and that the details of the testing were with Dr. Whitten.

* * *

(Cont'd)

an extended colloquy, Hutzel Hospital's motions addressing petitioner's other claims were also denied. When Hutzel Hospital rested its case (without calling a single witness), and renewed its motions for judgment as a matter of law, they were again denied by the trial court. (App. I, 37a-40a; 43a)

ii. Children's Hospital

Children's Hospital also moved for a judgment as a matter of law at the conclusion of petitioner's case. With respect to petitioner's federal claim, the trial court ruled that recovery under 42 U.S.C. § 1395dd, *et seq.*, is directed towards "invidious treatment" which was not present in the case at bar. Finding no evidence that Stephanie was treated any differently than any other child would have been treated on June 9, 1990, the trial court granted the motion of Children's Hospital to dismiss petitioner's claim under 42 U.S.C. § 1395dd(a). (App. I, 41a-43a) The trial court denied the Hospital's motion to dismiss petitioner's common law claim of medical negligence.

5. Petitioner's Request To Charge And The Verdict

When all parties had rested, petitioner filed with the trial court her Second Amended Request to Charge. With respect to her claim that Hutzel Hospital was professionally negligent, petitioner requested the trial court to give Michigan Standard Jury Instruction 30.01. This instruction provides that "professional negligence" or "malpractice" is the failure to do something which a reasonably careful hospital would do or the doing of something which a reasonably careful hospital would

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(Cont'd)

It is a question for the jury. A question for the jury in the first instance. I'm not going to rule as a matter of law, no, in the face of that answer to that interrogatory. (App. I, 38a)

not do under the same or similar circumstances. (App. G, 32a) This standard jury instruction on professional negligence would have permitted the jury to consider Dr. Lubin's opinion that Hutzel Hospital had a duty to obtain Stephanie's sickle cell test results and to report those results to petitioner or Stephanie's physician.

The trial court, however, fashioned an instruction which restricted the jury's consideration to whether or not Hutzel Hospital had followed the generally accepted practices in the medical community when obtaining petitioner's consent for the drawing of Stephanie's blood. (App. F, 31a) This narrow instruction foreclosed the jury from considering petitioner's claim that Hutzel Hospital had negligently failed to obtain Stephanie's sickle cell test results and to notify petitioner or Stephanie's physician that Stephanie had tested positive for sickle cell disease.

Petitioner also submitted to the trial court special instructions regarding the circumstances under which the jury could find that an actual or ostensible agency relationship existed between Hutzel Hospital and the Sickle Cell Program. In addition, since Hutzel Hospital had argued that its sickle cell screening program was merely a gratuitous service, petitioner requested the trial court to instruct the jury that Hutzel Hospital had a duty to exercise reasonable care even in connection with a gratuitous undertaking. (App. G, 32a-35a) These requested instructions were consistent with both the record evidence and petitioner's theories of liability. Without explanation, however, the trial court refused to instruct the jury on these issues.

During closing argument, Hutzel Hospital argued to the jury that the only claim against it was the claim that the Hospital failed to obtain petitioner's informed consent. In view of the trial court's refusal to instruct the jury regarding petitioner's claims

of professional negligence and agency, petitioner made no reference to these claims during closing argument. On March 7, 1994, utilizing a special verdict form, the jury found that both Hutzel Hospital and the Sickle Cell Program were negligent. However, they found that Hutzel Hospital's failure to provide informed consent was not a proximate cause of plaintiff's injuries. The jury also found that Dr. Knazik was not professionally negligent.

D. Post-Trial Proceedings and Appeal

1. Petitioner's Motion For a New Trial

On March 22, 1994, petitioner filed a motion for new trial as to defendants Hutzel Hospital and Children's Hospital on the issue of liability, only. Petitioner's motion with regard to Hutzel Hospital was based on the trial court's failure to instruct the jury as to petitioner's claims of professional negligence, gratuitous undertaking and agency. Petitioner argued that these claims were properly pleaded, supported by the record evidence, and should have been submitted to the jury. Petitioner also pointed out that in denying Hutzel Hospital's motion for judgment as a matter of law, the trial court specifically found that the issue of agency involved questions of fact for the jury. With respect to petitioner's claim against Children's Hospital, petitioner argued that the Hospital's violation of 42 U.S.C. § 1395dd(a) presented a question of fact for the jury.

On May 13, 1994, the trial court entered an order denying petitioner's motion for a new trial. In support of his denial, the trial court erroneously stated that petitioner's requested instructions regarding the liability of Hutzel Hospital were not given because petitioner's claims pertaining to those instructions had been dismissed. The trial court also concluded that the federal statute had no applicability to this case:

> The pending motion is predicated on the failure of the Court to instruct on the dismissed claims. The recorded reasons for dismissal of these claims is an adequate response by the Court to the motion. The transcript of these reasons is currently not available. No useful purpose would be served by trying to restate the reasons in this order. Suffice it to say, there was no evidence at trial to support a finding that Hutzel Hospital had any obligation except to obtain an informed consent from Dinkins' mother. The jury found that it failed to do so but that this failure was not a proximate cause of Dinkins' death. This finding was the jury's to make. As to Children's, the jury found it was not negligent. That again was the jury's decision to make. The federal statute, aside from getting this case into federal court, had no applicability to the facts as reflected in the evidence at trial.

(App. C, 26a)

The trial court's statement that he had dismissed petitioner's claims against Hutzel Hospital is belied by the trial record in this case. There are no "recorded reasons for dismissal" because petitioner's claims against Hutzel Hospital were never dismissed. Not only did the trial court twice deny Hutzel Hospital's motion for judgment as a matter of law, but he specifically found issues of fact which required determination by the jury. (*See* Appendix I)

2. The Opinion of the Court of Appeals

On appeal, it was petitioner's position that the trial court had erred in refusing to instruct the jury on her claims against Hutzel Hospital pertaining to professional negligence, gratuitous undertaking and agency. These claims were supported by record evidence and sufficiently grounded in fact to survive Hutzel Hospital's motions for judgment as a matter of law. Petitioner argued that, under these circumstances, she was entitled to have her claims submitted to the jury with appropriate instructions regarding applicable Michigan law. Petitioner also argued that the trial court erred in dismissing her claim that Children's Hospital violated 42 U.S.C. § 1395dd(a)

Notwithstanding the record, the Court of Appeals apparently accepted the trial court's post-trial representations that he had dismissed petitioner's claims of professional negligence and agency during trial. Disregarding or overlooking that portion of the record which reflects the trial court's denial of Hutzel Hospital's motions for judgment as a matter of law, the Court of Appeals began its opinion by erroneously characterizing this case as one in which petitioner's primary claims against Hutzel Hospital were dismissed during trial:

> Tawanda Dinkins appeals from the district court's dismissal of and refusal to instruct the jury on several theories of liability in a suit to recover damages for the death of her daughter due to the failure of a testing institution to notify anyone that the daughter had sickle cell disease.

(App. B, 3a-4a) In the opinion that followed, the Court of Appeals proceeded to affirm the trial court's disposition of the

case. In doing so, however, it failed to consider significant aspects of the record evidence and viewed the evidence it did consider in a light least favorable to petitioner's case. The Court of Appeals also failed to apply Michigan common law pertaining to the ostensible agency between hospitals and those who work under their auspices. Finally, the Court of Appeals failed to apply its own interpretation of what constitutes "appropriate medical screening" within the meaning of 42 U.S.C. § 1395dd(a).

REASONS FOR GRANTING THE WRIT

This matter presents two important federal questions for the Court. First, the trial court in this case failed to conduct the trial in a way that comported with fundamental principles of fairness and due process. It refused to instruct the jury on issues that twice survived a motion for judgment as a matter of law; and it dismissed petitioner's cause of action under the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd(a), based on a misapplication of the Sixth Circuit's interpretation of "appropriate medical screening" under the Act. Moreover, the Court of Appeals affirmed the trial court with no basis in the record and misapplied its own interpretation of "appropriate medical screening" under § 1395dd(a). The Court of Appeals also failed to apply Michigan substantive law to petitioner's state claims. These actions constituted such a gross departure from the accepted and usual course of judicial proceedings, and so deprived petitioner of her right to a trial by jury and procedural due process, as to call for the exercise of this Court's supervisory power.

Second, the Court is asked to provide its guidance regarding an important issue of statutory interpretation. The courts of appeals, including the Court of Appeals for the Sixth Circuit, have attempted to interpret the "appropriate medical screening" provision of the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd(a). It is unclear whether the provision

simply requires a hospital to apply its standard screening procedures uniformly to all patients or whether the Act requires a hospital to develop screening procedures for acute symptoms that could be indicative of a life-threatening condition. There is also a question of whether the hospital's "motive" is an element of a cause of action under the Act. The courts of appeals are in conflict as to these questions.

I.

THE COURT OF APPEALS' AFFIRMATION OF THE TRIAL COURT'S JUDGMENT DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THEREFORE PRESENTS AN IMPORTANT FEDERAL PROCEDURAL QUESTION.

This case presents an important question of federal procedural law. The actions of the trial court, and the affirmation of those actions by the Court of Appeals, usurped the fact-finding function of the jury and violated fundamental principles of procedural due process. This radical departure from accepted and usual judicial proceedings warrants a grant of certiorari.

A. The Court of Appeals' Affirmation of the Trial Court's Refusal to Instruct the Jury on Issues that Withstood a Motion for Judgment as a Matter of Law Deprived Petitioner of Her Right to a Jury Trial.

The trial court, having twice denied a motion for judgment as a matter of law with regard to petitioner's claims against Hutzel Hospital, failed to instruct the jury on these issues. Although the trial court had made a finding that denial of the motion was appropriate because the claims presented in the motion should be decided by the jury, he refused to submit these very claims to the jury. In response to post-trial motions, the trial court mischaracterized his prior actions as a "dismissal" of

petitioner's claims against Hutzel Hospital. The record clearly reflects those claims were not dismissed. By proceeding as though petitioner's claims had been dismissed, the trial court deprived petitioner of procedural due process, as well as her right to a trial by jury.

Once a party's claims have survived a motion for judgment as a matter of law, it has the unequivocal right to have the claims determined by the jury. With regard to a directed verdict, "if there is substantial evidence in the record raising a relevant fact issue for determination by the jury, the decision of that issue may [not] be taken from the jury." *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 419-20 (5th Cir. 1985) If the claims survive summary dismissal or judgment as a matter of law, they must go to the jury with proper instructions. These principles are fundamental.

> A litigant is entitled under federal rules of procedure to have the jury instructed as to its claims and theories of law if they are legally correct, supported by the evidence, and brought to the court's attention in a timely [manner]. . . . A district judge has broad discretion in framing the form and language of the charge to the jury . . . as long as the entire charge fairly and adequately contains the law applicable to the case.

Board of Water Works Trustees v. Alvord, Burdick & Howson, 706 F.2d 820, 823 (8th Cir. 1983). *See Quillen v. International Playtex, Inc.*, 789 F.2d 1041, 1045 (4th Cir. 1986) (appellate court's reasoning "start[s] with the premise" that parties are entitled to instructions on the theory or defenses of the case); *Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 496 (10th Cir.

1985) (if warranted by the evidence presented at trial, a party is entitled to instruction on its theory of the case). The failure of a trial judge to instruct the jury on the surviving theories of the case deprives a litigant of its right to a trial by jury.

Procedural due process requires that a litigant be afforded his or her day in court and that parties be given the effective and timely opportunity to object to judicial actions. *Miera v. First Sec. Bank of Utah, N.A.*, 776 F.2d 902, 906 (10th Cir. 1985) Failure to provide such procedural entitlements will be reviewed and reversed at the federal appellate level. *Id.* at 906. These principles are essential to the proper functioning of the federal judicial system.

This Court, where necessary, has exercised its supervisory authority in order to preserve these important principles. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), for example, the district court had determined that issues raised by the petitioner's complaint were equitable in nature, despite the petitioner's demand for a jury trial. The Court "granted certiorari because maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id.* at 501 (citations omitted). The Court held that the limitation of the petitioner's opportunity to fully try every issue was not justified. *Id.* at 508. Similarly, in the case at bar, the trial court's refusal to instruct the jury on the claims against Hutzel was an unwarranted curtailment of petitioner's right to have her claims decided by a jury.

Because the Court of Appeals affirmed the lower court's refusal to instruct the jury on petitioner's claims against Hutzel, after the trial court twice denyed the Hospital's motion for judgment as a matter of law, this Court should grant petitioner's

request for certiorari in the exercise of its supervisory authority pursuant to Sup. Ct. R. 10(a).[5]

B. In Affirming the Trial Court's Judgment, the Court of Appeals Disregarded Relevant Record Evidence Which Supported Petitioner's Claims.

Addressing petitioner's claim that Hutzel Hospital had a professional duty to notify petitioner that her daughter had tested positive for sickle cell disease, the Court of Appeals erroneously concluded there was no evidentiary support for this claim:

> Next, with regard to the "failure to notify of results" theory of negligence, there is nothing to suggest that Hutzel had a duty to notify, no evidence that it was negligent in this regard . . .

(App. B, 16a)

In arriving at this conclusion, the Court of Appeals simply ignored the extensive testimony of petitioner's expert, Dr. Lubin. (Appendix M) Although Dr. Lubin gave unrebutted testimony that Hutzel Hospital had a professional obligation to notify petitioner of Stephanie's sickle cell screening test result, the Court of Appeals either overlooked his testimony or concluded his opinions were entitled to no weight.

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5. The Court has granted certiorari to resolve similar procedural questions. *E.g., Chapman v. United States*, 365 U.S. 610, 611 (1960) (certiorari granted to determine whether lower courts violated "standards governing admissibility of timely challenged evidence"); *LeTulle v. Scofield*, 308 U.S. 415, 419 (1940) (certiorari sought to determine whether court of appeals "had departed from the usual and accepted course of judicial proceedings by deciding the cause upon a ground not presented or argued and hence had deprived the petitioner of his day in court").

The Court of Appeals also found no evidence that Hutzel Hospital had undertaken to provide sickle cell disease screening as a patient service, and no evidence that the Sickle Cell Program was the hospital's agent for purposes of carrying out such testing:

> Dinkins next argues that Hutzel "was providing Sickle Cell disease testing as a patient service which it deemed appropriate for the care and treatment of African American newborns delivered at the hospital." Plaintiff's Third Brief at 18. This statement would appear irrelevant and a gross mischaracterization of the record. Hutzel never endeavored to provide screening in any way other than by its decision to cooperate with the Program. The totality of the record reflects that Hutzel was simply approached by an innovative effort in this area, and agreed to cooperate. Even if the plaintiff's version were true, it does not establish the fact that the Program was an agent of Hutzel.

(App. B, 13a)

In concluding Hutzel Hospital did not undertake to provide sickle cell disease screening as a patient service, the Court of Appeals disregarded significant portions of the record evidence. As previously noted, there were three evidentiary sources which supported petitioner's claim that Hutzel Hospital undertook to provide sickle cell screening as part of its routine professional care of newborns. First, in conjunction with her admission to the hospital, petitioner was required to sign Hutzel Hospital's general consent form which authorized the hospital to draw blood for diagnostic purposes; that consent form was a

prerequisite to performing sickle cell disease screening. Second, Dr. Whitten gave unrebutted testimony that sickle cell screening was a reasonable and appropriate part of routine patient care at Hutzel Hospital. Finally, Hutzel Hospital itself admitted that it drew blood from Stephanie Dinkins as part of its routine sickle cell testing of all black newborns.[6]

The foregoing evidence gave rise to a reasonable inference that Hutzel Hospital was providing sickle cell testing as part of its routine professional care of newborns. This evidence also provided a basis from which the jury reasonably could have inferred that the Sickle Cell Program was Hutzel Hospital's agent for the purpose of conducting sickle cell disease screening. The Court of Appeals' conclusion that there was no evidence to support petitioner's claims of professional negligence and agency was clearly contrary to the record in this case.

C. In Affirming the Trial Court's Judgment, the Court of Appeals Failed To Apply Michigan Common Law Pertaining To A Hospital's Liability For An Ostensible Agent.

The Court of Appeals also affirmed the trial court's refusal to instruct the jury on plaintiff's ostensible agency claim. Citing *Little v. Howard Johnson Co.*, 183 Mich. App. 675 (1990), the Court of Appeals concluded an ostensible agency could not be found because plaintiff had no expectation sickle cell testing would be performed and in no way relied upon any act or omission of Hutzel Hospital. (Appendix B, 9a-12a). *Little* is a slip and fall case decided by Michigan's intermediate appellate court. It did not involve the issue of a hospital's liability for the

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6. As the trial court pointed out, this admission alone gave rise to an inference that the Sickle Cell Program was Hutzel Hospital's agent for purposes of conducting sickle cell screening on newborns delivered at the hospital. (App. I, 37a-39a)

acts of an independent contractor. The controlling Michigan case which defines the circumstances under which a hospital is estopped from denying liability for the negligent acts of an independent contractor is *Grewe v. Mount Clemens Hospital*, 404 Mich. 240 (1978).

In *Grewe*, the Michigan Supreme Court recognized that hospitals routinely undertake to render treatment to patients, and patients often look to and depend upon hospitals to do so. The Court held that it is this reasonable reliance by patients that care will be rendered by agents of the hospital that gives rise to the hospital's liability for the negligent acts of independent contractors:

> In our view, the critical question is whether plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as a situs where his physician would treat him for his problems.

404 Mich. at 251.

In considering the propriety of holding a hospital liable for the acts of its independent contractors, the Court recognized that, in the absence of specific representations by the hospital, the patient is in no position to distinguish between an independent contractor and a hospital employee. 404 Mich. at 253. It was the Court's plain intent in *Grewe* to prevent a hospital from avoiding liability for the acts of an independent contractor where, as here, the patient has a reasonable expectation that care will be provided by agents of the hospital, and the hospital does nothing to advise the patient to the contrary. Similar to *Grewe*, the critical question in the case at bar is whether petitioner reasonably looked to the hospital to perform medically appropriate blood tests. The unrebutted testimony of petitioner was that she did.

The Court of Appeals concluded ostensible agency could not be found in this case because petitioner had no specific expectation sickle cell testing would be conducted. That conclusion was an unwarranted departure from *Grewe*. The *Grewe* Court recognized that hospitals and patients do not typically interact with equal knowledge or sophistication. Just as patients are unable to distinguish between independent contractors and hospital employees, most patients are unaware of the specific treatment modalities that will be deemed medically appropriate for their care. This is particularly true of diagnostic laboratory testing. By exempting the Hospital from liability because petitioner had no advance knowledge or expectations regarding the specific laboratory test whose positive result went unreported, the Court of Appeals reintroduces a technical defense of the very type the Michigan Supreme Court intended to eliminate in *Grewe*.

As the Sixth Circuit has held, a federal court exercising pendant jurisdiction sits as a court of the forum state and is bound to apply its substantive law. *Haynes v. Marshall*, 887 F.2d 700, 705 (6th Cir. 1989). The *Grewe* case represents a pronouncement by Michigan's highest court regarding the circumstances under which a hospital will be deemed liable for the acts of an independent contractor. Both the trial court and the Court of Appeals were required to apply *Grewe* to the facts of this case. Their failure to do so deprived petitioner of a fundamental right to procedural due process.

D. The Court of Appeals Erred in Failing to Apply Its Own Interpretation of the "Appropriate Medical Screening" Standard Set Forth in the Emergency Medical Treatment and Labor Act. 42 U.S.C. § 1395dd(a).

The Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd(a) (App. E, 29a), requires in pertinent part that a patient who presents to a hospital emergency room for

treatment be given "an appropriate medical screening examination within the capability of the hospital's emergency department" to determine whether an "emergency medical condition" exists. *Id.* The judicial interpretation of what Congress intended by "appropriate medical screening examination" has been extensively litigated.[7]

The Sixth Circuit was one of the first circuits to interpret the Act. In *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266 (6th Cir. 1990), the court noted the ambiguity of the phrase "appropriate medical screening", discussed Congress' intent in enacting the statute, and held that an appropriate medical screening is one that a hospital with an emergency room would offer to any paying patient. *Id.* at 268. It went on to reject a malpractice standard of care to determine whether screening was appropriate, ruling that " 'appropriate' must be interpreted to refer to the motives with which the hospital acts." *Id.* at 272. The *Cleland* court concluded that where a hospital provides substandard or nonexistent medical screening **for any reason** it may be liable under the statute. *Id.* Whether a hospital's screening procedures are appropriate or substandard is to be determined, the court held, by the hospital's own standards. *Id.*

Cleland remains the law of the Sixth Circuit. In the case at bar, however, the Court of Appeals erred by failing to apply its own rule to the case before it. Instead, in a cursory affirmation of the trial court's dismissal of petitioner's cause of action under § 1395dd(a), it failed to state any reasons for removing the issue from the jury.

Citing *Cleland*, the Court of Appeals declared that the rule of the circuit is that § 1395dd(a) "imposes a duty of appropriately

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7. The disagreement among the circuits as to the meaning of this phrase is discussed below.

screening those who come to emergency rooms." (App. B, 18a). This duty is expressly stated in the statute itself. The court then stated that petitioner could not show inappropriate screening, because Children's Hospital did not know about Stephanie's condition.[8] The court thereby bootstrapped a conclusion rather than address petitioner's argument, *i.e.*, Children's had in place a protocol to treat sickle cell disease, but Dr. Knazik failed to utilize screening procedures necessary to determine if the protocol should have been initiated. The court engaged in absurd reasoning, suggesting that a hospital that fails to screen should be excused from liability because it does not know about the condition that, through appropriate screening, would have become apparent.

The law of the circuit clearly imposes liability on a hospital that "provides a substandard (by its standards) . . . medical screening." *Cleland*, 917 F.2d at 272. Children's Hospital had a treatment protocol for sickle cell disease, but it failed to apply the necessary screening procedures in order to determine whether the protocol should have been initiated. Children's did not "provide for an appropriate medical screening examination within the capability of [its] emergency department," as required by § 1395dd(a). At a minimum, the question of whether Children's screening procedure was appropriate was for the jury. The Court of Appeals' failure to apply its own interpretation of the statutory language was error. The Court of Appeals failed to apply the proper law regarding liability under § 1395dd(a). Because this decision constituted a gross departure from the "accepted and usual course of judicial proceedings," this Court should grant Petitioner's request for certiorari in the exercise of its supervisory powers pursuant to Sup. Ct. R. 10(a).

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8. The court characterizes sickle cell disease as a "relatively rare condition" (App. B, 18a) a finding that has no basis in the record or in fact, particularly as among the African-American population.

II.

THE SIXTH CIRCUIT'S INTERPRETATION OF "APPROPRIATE MEDICAL SCREENING" UNDER 42 U.S.C. § 1395dd(a) IS IN CONFLICT WITH THE INTERPRETATION OF THAT SECTION BY OTHER CIRCUITS.

As noted above, a substantial amount of litigation has focused on the parameters of the duty created by 42 U.S.C. § 1395dd(a). While the circuits agree that the Act does not create a federal malpractice action, *e.g.*, *Cleland*, 917 F.2d at 268; *Correa v. Hospital San Francisco*, 69 F.3d 1184 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1423 (1996), their agreement ends there. This Court is asked to provide an interpretation and clarification of the "appropriate medical screening" language under § 1395dd(a), and to resolve this significant conflict among the circuits.

In *Cleland*, the Court of Appeals for the Sixth Circuit held that: (1) an appropriate medical screening is one that a hospital emergency room would offer any paying patient; (2) the word "appropriate" refers to the hospital's motives; and (3) the screening procedures are to be measured against the hospital's own standards. Since 1990, other circuit courts applying 42 U.S.C. § 1396dd(a) have departed from the statutory interpretation set forth in *Cleland*.

In *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1041 (D.C. Cir. 1991), the Court of Appeals for the District of Columbia Circuit held that a hospital fulfills the appropriate screening requirement "when it conforms its treatment of a particular patient to its standard screening procedures." Conformity to the standard screening methods virtually guarantees a hospital's escape from liability; departure from the

standard procedures constitutes a violation of § 1395dd(a). *Id.* at 1041. Departing from the Sixth Circuit's reasoning in *Cleland*, the court noted that "The motive for such departure is not important to this analysis, which applies whenever and for whatever reason a patient is denied the same level of care provided others and guaranteed him or her by subsection 1395dd(a)." *Id.*

At least two other circuits, the Eighth and the Eleventh, have joined the D.C. Circuit in emphasizing the uniform application of a hospital's standard screening procedures as the bedrock requirement under 42 U.S.C. § 1395dd(a). *Williams v. Birkeness*, 34 F.3d 695, 697 (8th Cir. 1994) (holding that "appropriate medical screening" means "uniform treatment" and an essential showing under the Act is that the hospital treated the patient differently from other patients); and *Holcomb v. Monahan*, 30 F.3d 116, 117 (11th Cir. 1994) (statute "only requires a hospital to provide indigent patients with a medical screening similar to one which they would provide any other patient").

Adopting a significantly different interpretation, the First and Ninth Circuits have interpreted 42 U.S.C. § 1395dd(a) as imposing upon hospitals a duty to utilize screening procedures which will enable the examining physician to determine whether acute or severe symptoms represent a life-threatening condition. *Correa v. Hospital San Francisco, supra; Eberhardt v. City of Los Angeles*, 62 F.3d 1253 (9th Cir. 1995). The *Correa* court articulated this interpretation as follows:

> A hospital fulfills its statutory duty to screen patients in its emergency room if it provides for a screening examination reasonably calculated to identify critical medical conditions that may be afflicting symptomatic patients and provides that level

> of screening uniformly to all those who present substantially similar complaints. 69 F.3d at 1192.

Similarly, the *Eberhardt* court stated:

> Thus, the plain language of the EMTALA informs us that a medical screening examination is "appropriate" if it is designed to identify *acute* and *severe* symptoms that alert the physician of the need for *immediate* medical attention to prevent serious bodily injury. The EMTALA does not require physicians to detect medical conditions that are *not* manifested by acute and severe symptoms, nor those that do not require immediate medical attention to prevent serious bodily injury.
>
> * * *
>
> The touchstone is whether, as § 1395dd(a) dictates, the procedure is designed to identify an "emergency medical condition," that is manifested by "acute" and "severe" symptoms. 69 F.3d 1257-1258.

In two separate opinions, the Fourth Circuit has followed **both** the *Gatewood* interpretation **and** the *Correa-Eberhardt* interpretation of the Act. *Vickers v. Nash General Hospital, Inc.*, 78 F.3d 139, 143 (4th Cir. 1996) (the Act requires emergency medical screening applied uniformly to patients presenting with the same medical condition); *Baber v. Hospital Corporation of America*, 977 F.2d 872, 879 (4th Cir. 1992)

(statute requires a hospital to develop a screening procedure to determine whether a patient with acute or severe symptoms has a life-threatening or serious medical condition).[9]

Thus, the courts of appeals have developed various and differing interpretations of "appropriate medical screening" under § 1395dd(a). The manner in which this federal statute is applied to a particular case depends upon the circuit in which the case is brought, and even then the application may vary. Currently, it is unclear what a plaintiff must allege and prove in order to establish liability under 42 U.S.C. § 1395dd(a). Because of the important issue of statutory interpretation involved, and because of the conflict among the courts of appeals regarding the proper interpretation of this statutory section, the Court should grant petitioner's request for certiorari.

CONCLUSION

For the reasons set forth above, petitioner prays that this Court grant a Writ of Certiorari to review the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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9. The *Baber* court also noted that it would be possible, in theory, for a hospital to develop a screening procedure with so low a standard that it would amount to no appropriate screening. *Baber*, 977 F.2d at 879 n.7.

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED MARCH 22, 1996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-1643

TAWANDA DINKINS, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHANIE AMBER DINKINS, DECEASED,

Plaintiff-Appellant,

v.

HUTZEL HOSPITAL, A MICHIGAN NON-PROFIT CORPORATION, ET AL.,

Defendants-Appellees.

BEFORE: BROWN, BOGGS, and NORRIS, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — ORDER AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN DATED JANUARY 30, 1996

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 94-1643 & 94-1683

TAWANDA DINKINS, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHANIE AMBER DINKINS, DECEASED,

Plaintiff-Appellant, Cross-Appellee,

v.

HUTZEL HOSPITAL, INC., and CHILDREN'S HOSPITAL OF MICHIGAN,

Defendants-Appellees, Cross-Appellants,

THE SICKLE CELL DETECTION AND INFORMATION PROGRAM, INC.,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: **BROWN, BOGGS, and NORRIS, Circuit Judges.**

PER CURIAM. Tawanda Dinkins appeals from the

district court's dismissal of and refusal to instruct the jury on several theories of liability in a suit to recover damages for the death of her daughter due to the failure of a testing institution to notify anyone that the daughter had sickle cell disease. Because the evidence does not support any type of agency relationship between Hutzel Hospital, where Dinkins's daughter was born, and the negligent testing agency, we affirm the trial court's disposition of the claims predicated on that hospital's liability as a principal. We affirm the trial court's decision not to offer special jury instructions because there was no evidence to support such instructions. Finally, because it did not offer substandard treatment, we agree with the trial court that Children's Hospital, where Dinkins's daughter died from acute sickle cell crisis, was not liable under the anti-patient dumping provisions of EMTLA.

I

This appeal arises from a medical malpractice suit brought by Tawanda Dinkins on behalf of the estate of her deceased daughter, Stephanie Dinkins. Dinkins brought suit against three medical institutions and an individual doctor because of their purported negligence that led to Stephanie's death from complications of sickle cell anemia. The doctor, Stephanie's pediatrician, settled out of court. The three medical institutions are Hutzel Hospital ("Hutzel"), The Sickle Cell Detection and Information Program, Inc. ("the Program"), and Children's Hospital of Michigan ("Children's"). Although Hutzel filed a cross-appeal, its brief indicated that, because of the plaintiff's arguments on appeal, the cross-appeal is no longer necessary.

Dinkins went to Hutzel Hospital to give birth to her daughter in September 1986. When Dinkins checked into the hospital, she signed a consent form that read, in pertinent part:

Appendix B

> In connection with certain routine diagnostic tests I understand that specimens of blood, urine and other bodily fluids, tissues or procedures, may be obtained and that routine tests will be performed on such fluids, tissues, and end products, and I consent to the same.

Dinkins testified that she understood this form to allow the hospital to take "blood or whatever fluids," and that she expected she would be notified about abnormalities. There is no evidence that Hutzel counseled Ms. Dinkins at this time about sickle cell disease in particular, or told that her daughter would be tested for it. Ms. Dinkins gave birth without immediate complications.

At the time of Stephanie's birth, Hutzel cooperated in a procedure that led to the testing of her blood for sickle cell disease. Although Hutzel did not perform the testing itself, it cooperated with an organization implementing a pilot program to screen for sickle cell disease, the Sickle Cell Detection and Information Program, by giving a courier from the Program a blood sample taken from Stephanie's umbilical cord. The parties stipulated that Hutzel properly labeled the blood sample, and properly released the sample to the Program.

At this point, our attention shifts to the Program and what it did and did not do with the blood sample provided by Hutzel. The parties stipulated to the fact that the Program tested the sample and that it tested positive for sickle cell disease. The failure occurred at the notification stage. Although the Program had routine procedures in place to notify the family and physicians of any newborn that tested positive for sickle cell disease, the Program apparently failed to notify anyone that Stephanie

Dinkins tested positive. Dr. Jorge Rose, Stephanie's pediatrician, claimed that he was never notified of this finding, as did Ms. Dinkins. Thus, everyone concerned proceeded to deal with Stephanie as if she were a normal healthy child.

The critical stage in this matter occurred when three-year-old Stephanie became sick with flu-like symptoms, including diarrhea, vomiting, and irritability, on June 8, 1990. Her illness persisted and, on June 9, her mother took her to the emergency room at Children's Hospital of Michigan. There she was seen by an emergency room physician, Dr. Knazik, who inquired about her past medical history. Dr. Knazik had no evidence that Stephanie suffered from sickle cell disease and her medical history did not reflect the earlier discovery by the Program of sickle cell disease. Therefore, Dr. Knazik treated Stephanie as a normal child with the aforementioned symptoms. He thus began a treatment and diagnostic regime adequate to address the symptoms he observed, but not adequate to address the actual sickle cell crisis that Stephanie was undergoing. Dr. Knazik had an X-ray taken, diagnosed an acute middle ear infection for which he administered an antibiotic, and discharged Stephanie with a prescription and instructions to return if her condition did not improve within 24 hours.

Unfortunately, Stephanie's condition continued to deteriorate upon her return home. She returned to Children's Hospital via ambulance the following day, where she later died. Stephanie's death resulted from a particular complication of sickle cell disease known as acute sickle cell crisis, where the body's immune system is unable to deal with an otherwise manageable infection. Dr. Knazik testified that Children's Hospital had in place a special protocol to deal with sickle cell crisis, but that it was not employed on June 9 because there was no evidence that Stephanie suffered from the disease.

Appendix B

Dinkins sued Hutzel, Children's, and the Program under a number of theories in state court. Children's had the case removed to federal court, based on federal question jurisdiction, pursuant to 42 U.S.C. § 1331, and 42 U.S.C. § 1441(b). Dinkins alleged that Hutzel was actively negligent under two theories: (1) Hutzel had an obligation to advise plaintiff that her daughter's blood was being released for sickle cell testing; and (2) Hutzel had an affirmative duty to learn of the test results and communicate them to Ms. Dinkins. Ms. Dinkins also sought to hold Hutzel vicariously liable for the actions of the Program under two agency theories: (1) that the Program was an *actual* agent of Hutzel for purposes of testing newborns for sickle cell disease; and (2) that the Program was the *ostensible* agent of Hutzel for purposes of testing newborns for sickle cell disease.

Dinkins also alleged Children's was liable under two separate theories. The first theory was that Children's was negligent for failing to test Stephanie for sickle cell disease. The second theory was that Children's violated the federal anti-patient-dumping law, 42 U.S.C. § 1395dd(a), when it discharged Stephanie without following its sickle cell treatment protocol.

Dinkins also sued the Program, but the Program is not participating in this appeal.

The scope of Dinkins's claims against Hutzel and Children's was narrowed considerably by the district court through its refusal to instruct the jury on several of the theories of liability argued by Dinkins. As to defendant Hutzel, the district court held that the only theory of negligence for which there was sufficient evidence was Hutzel's failure to secure Ms. Dinkins's informed consent. With respect to Ms. Dinkins's efforts to hold Hutzel vicariously liable for the conduct of the Program, the district

court declined to instruct the jury that it could find that the Program was either an actual or an ostensible agent of Hutzel.

The claims against Children's were similarly narrowed. The district court dismissed the patient-dumping claim because there was no evidence that Children's treated Stephanie any differently than any other child arriving at its emergency room with Stephanie's symptoms and lack of sickle cell history. The court allowed the jury to rule on Dinkins's theory of negligence grounded in Children's failure to ascertain that Stephanie had sickle cell disease.

At trial, both Hutzel and Children's were held blameless by the jury. The jury found that Hutzel was professionally negligent for failing to obtain informed consent from Ms. Dinkins, but that this negligence was not the proximate cause of the plaintiff's damages. The Sickle Cell Detection Program declined to participate in the trial, and the jury found the Program negligent in Stephanie's death and awarded damages of $3 million, although plaintiff had only asked for $2 million. The district court's decisions foreclosing proof on Dinkins's various other theories of negligence form the basis of her appeal.

II

Dinkins's seven allegations of error can be divided into three areas: 1) alleged errors resulting from foreclosure of the agency theories linking Hutzel Hospital with the Program; 2) alleged errors resulting from the district court's rejecting Dinkins's jury instructions on particular methods of finding Hutzel negligent (voluntary undertaking, failure to obtain and notify of test results, and violation of federal regulations); and 3) the allegation that the district court erroneously decided that the

patient-dumping claim against Children's lacked enough factual support to send it to the jury.

III

Three of the plaintiff's seven allegations of error relate to her efforts to hold Hutzel liable for the actions of the Sickle Cell Detection Program: 1) the denial of summary judgment on ostensible agency; 2) the refusal to instruct on ostensible agency; and 3) the refusal to instruct on actual agency. Each of the individual allegations of error have particular problems, while collectively they suffer from a nearly complete absence of factual support for any type of agency relationship between Hutzel and the Program.

We review *de novo* a district court's decision to grant or deny a motion for summary judgment. We apply Michigan law to resolve the ostensible agency questions. The court in *Little v. Howard Johnson Co.*, 183 Mich. App. 675, 679, 455 N.W.2d 390, 394 (1990), outlined the test for the existence of ostensible agency under Michigan law as follows:

> [First] The person dealing with the agent must do so with the belief in the agent's authority and this belief must be a reasonable one; [second] Such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person relying on the agent's apparent authority must not be guilty of negligence. [*Sasseen v. Community Hosp. Foundation*, 159 Mich. App. 231, 238, 406 N.W. 2d 193 (1986), quoting *Grewe v. Mt. Clemens General*

Hosp., 404 Mich. 240, 253; 273 N.W. 2d 429 (1978)].

The *Little* court went on to conclude that "the alleged principal must have made a representation that leads the plaintiff to reasonably believe that an agency existed and to suffer harm on account of a justifiable reliance thereon." *Ibid.*

This theory has been relied upon in many cases to hold a hospital liable for the actions of medical personnel not employed by the hospital, but functioning in the hospital in such a way as to convince patients that they are a part of the hospital. In *Grewe*, for example, a hospital was held responsible for the actions of emergency room physicians who reasonably appeared to be part of the hospital. *See also Howard v. Park*, 37 Mich. App. 496, 195 N.W.2d 39 (1972) (hospital bound by ostensible agency for doctor who improperly removed cast where doctor was independent contractor but, by all appearances to plaintiff, was employee of hospital).

Dinkins thus argues that when she went to Hutzel Hospital to deliver Stephanie, she looked to the hospital to "meet her . . . medical needs," and that "under these circumstances, the medical facility is precluded or 'estopped' from avoiding liability for the patients (sic) negligence (sic) injury on the grounds that the professionals (sic) personnel provided were actually independent contractors." Plaintiff's Brief at 27. To develop this argument, the plaintiff's brief simply cites and recounts the facts in *Howard* and *Grewe*. The plaintiff further contends that she "held a reasonable belief that Hutzel Hospital would conduct all necessary blood tests during her hospitalization," and that "[t]his belief was generated by the general consent form which Hutzel Hospital required plaintiff to

sign at the time of her admission to the hospital. . . ." Plaintiff's Third Brief at 24. Finally, the plaintiff concludes that Hutzel "did nothing to put plaintiff on notice that the sickle cell disease screening test would be conducted by an independent facility and that plaintiff would be notified by that facility." *Id.* at 25.

We reject the plaintiff's arguments that the theory of ostensible agency has any relevance to the facts presented here because Dinkins had *no* expectation of sickle cell testing and in no way relied upon any act or ommission of Hutzel in her relationship with the Program. Dinkins simply claims that she was relying on Hutzel to perform all necessary medical services.

However, Dinkins cannot establish the reliance element of an ostensible agency theory by reference to a generalized expectation that the hospital would do everything necessary for her care. None of the Michigan cases take such an approach. Ms. Dinkins had no expectation that her overall care would include sickle cell screening for her newborn. She admitted that she was never informed or advised that she should expect sickle cell screening for Stephanie. For these reasons we affirm the district court's decision to deny summary judgment on Dinkins's ostensible agency theory.

For the same reasons, we affirm the trial court's decision to refuse to instruct the jury on Dinkins's ostensible agency theory. We have previously held that a trial court will not be reversed for failure to instruct a jury on a particular theory where the litigant has not first shown the presence of sufficient evidence to support the theory. *Bucyrus-Erie Co. v. General Products Corp.*, 643 F.2d 413, 420 (6th Cir. 1981). As we have discussed, there is nothing in the record to suggest that Ms. Dinkins would have been able to prove any of the elements necessary to establish that

the Program was the ostensible agent of Hutzel Hospital.

Dinkins also alleges error due to the trial court's refusal to instruct the jury on her theory that the Program was the actual agent of Hutzel. Under Michigan law, for a party to be considered a "principal," it must have the right to control the purported agent. *Little v. Howard Johnson Co.*, 183 Mich. App. 675, 678, 455 N.W.2d 390, 393 (1990). The plaintiff is quick to point out, however, that the right to control need not be exercised, and can be inferred from the circumstances. *Ardash v. Karp*, 18 Mich. App. 241, 244, 170 N.W.2d 854, 856 (1969). Even giving credit for circumstantial evidence of an agency relationship, when all the facts that could support the theory of the Program as the agent of Hutzel are assembled, there is no question left for a jury and the trial court correctly refused to instruct.

To support her agency argument, the plaintiff points to three areas of the record, none of which support the existence of any type of agency relationship between Hutzel and the Program. Dinkins first argues that the general consent form allowing blood to be drawn for routine testing establishes that the Program was Hutzel's agent because "Dr. Whitten [the director of the Program] agreed that the sickle cell disease screening performed by his organization could not have been performed without the consent secured by Hutzel Hospital." Plaintiff's Third Brief, at 18. The argument does not show how this fact speaks to the question of whether Hutzel had the right to control the Program or relates to agency doctrine at all. The implication would appear to be that this gave Hutzel sufficient leverage over the Program that it could control the Program. Even were this true, it would still not establish a "right to control," as required by the Michigan law of agency.

Dinkins next argues that Hutzel "was providing Sickle Cell disease testing as a patient service which it deemed appropriate for the care and treatment of African-American newborns delivered at the hospital." Plaintiff's Third Brief at 18. This statement would appear irrelevant and a gross mischaracterization of the record. Hutzel never endeavored to provide screening in any way *other than by its decision to cooperate with the Program*. The totality of the record reflects that Hutzel was simply approached by an innovative effort in this area, and agreed to cooperate. Even if the plaintiff's version were true, it does not establish the fact that the Program was an agent of Hutzel.

Finally, Dinkins claims that "there was evidence in the record that Hutzel Hospital, itself, had an obligation to notify plaintiff of the sickle cell disease screening results." *Ibid.* By this, Dinkins presumably means the testimony of their expert, Dr. Lubin, to the effect that Hutzel *should* have notified participants. She goes on to assert that "[a]s part of a negotiated arrangement with Hutzel Hospital, however, the Program assumed the responsibility of notifying the newborn's physician of record by letter." *Ibid.* There is no evidence of any agreement between Hutzel and the Program other than an understanding that Hutzel would supply blood for the program to test. Most importantly, there is no evidence that Hutzel had any right to control the Program.

No matter how the plaintiff rearranges the facts or rewords Hutzel's explanation of its relationship with the Program, the record indicates that Hutzel drew blood, labeled it, and turned it over to the Program for testing. The record reflects that Hutzel was approached by the Program and gratuitously agreed to provide blood for screening — without ever having done any

screening on its own before the Program entered the picture. There is no evidence to suggest Hutzel even had any formal arrangement with the Program and certainly no evidence to suggest that the Program acted as Hutzel's agent. The trial court's decision to refuse a jury instruction that would have allowed a determination of negligence under an agency theory should therefore be affirmed.

IV

Dinkins has also alleged three other errors in the trial court's jury instructions: (1) failure to instruct the jury on her theory of voluntary undertaking; (2) failure to instruct the jury on Hutzel's failure to obtain and disseminate the results of the screening; and (3) failure to instruct that it would be negligence if Hutzel violated federal regulations pertaining to informed consent in testing situations.

A review of the record shows no support for the plaintiff's voluntary undertaking theory, and thus the trial court was justified in refusing this instruction. Because Hutzel argued that the standard of care did not require sickle cell screening, the plaintiff requested a special jury instruction (plaintiff's special jury instruction number 1) to the effect that "even if Defendant Hutzel Hospital voluntarily undertook to test Stephanie for sickle cell disease, the Hospital had a duty to exercise reasonable care in connection with that undertaking." The plaintiff merely cites three Michigan cases without any elaboration of their holdings, and concludes that failure so to instruct was reversible error.

We believe, however, that the record offered no support for the argument that Hutzel voluntarily undertook sickle cell

testing. To establish this theory, the plaintiff must produce evidence that Hutzel undertook to screen for sickle cell, that Hutzel either (a) failed to use reasonable care, thereby increasing the risk of harm, or (b) undertook to perform a duty owed by another to the plaintiff, or (c) the harm suffered was caused by reliance on Hutzel's undertaking. See Restatement of Torts 2d, § 324A, and *Smith v. Allendale Mut. Ins. Co.*, 410 Mich. 685, 303 N.W.2d 702 (1981).

As the defendant points out, none of the elements needed for a voluntary undertaking theory are present. Hutzel never formally undertook to screen for sickle cell, and its involvement was limited to providing a cord-blood specimen. It would appear to have done so in an entirely non-negligent manner. We cannot construe this as equivalent to an undertaking to screen for sickle cell or to notify patients of the Program's results. Such a construction of institutions' voluntary participation in innovative programs would deter such beneficial efforts and is materially different from a decision to offer a particular service. The plaintiff does not claim any type of specific reliance on Hutzel to provide screening or notify her of the results. She cannot claim that she went to Hutzel specifically expecting sickle cell testing and notification. We therefore conclude that Hutzel did not undertake a duty of either screening or notification and that, in any event, the harm caused to Stephanie was not the result of Dinkins's reliance on any action by Hutzel.

The argument concerning failure to obtain and disseminate the results differs slightly from the other allegations of error stemming from jury instructions because the plaintiff does not argue that the trial court failed completely to instruct on the theory. Rather, the plaintiff contends that the instruction was overly general and did not allow the jury to conclude that Hutzel

was negligent for failing to obtain informed consent and for failing to inform the plaintiff or her physicians of the results.

As a result, the standard of review is more deferential to the trial court and does not require the absence of a factual basis for the instruction. Rather, the inquiry is whether the instructions gave the jury adequate guidance to decide the issues that were tried. *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 802 (6th Cir. 1984).

The plaintiff's argument is very vague. She explains only that the trial court "eviscerated" her theories of liability based on informed consent and failure to disseminate results because the instruction explained that "the jury could only find Hutzel Hospital professionally negligent if it determined that the Hospital's failure to obtain a proper consent was a proximate cause of Stephanie's death." Plaintiff's Brief at 35. Aside from this assertion, the plaintiff offers no analysis to explain why this is so or why the instruction was incorrect. The exact nature of the error here is unclear.

Even if there was a clear allegation of error, we conclude that there was no error in the instruction. First, with respect to the informed consent theory, the general instruction came directly from the Michigan Standard Jury Instruction on professional negligence or malpractice, S.J.I.2d 30.01 and was augmented by more detailed instructions on informed consent claims. Next, with regard to the "failure to notify of results" theory of negligence, there is nothing to suggest that Hutzel had a duty to notify, no evidence that it was negligent in this regard, given that the Program had a notification protocol, and no argument from the plaintiff as to why the general instruction regarding malpractice was insufficient to inform the jury's consideration

of this theory. When considered in light of the record and the standard of review, the jury instructions were well within the court's discretion and warrant affirmance.

Dinkins's final allegation of error concerns her theory that Hutzel was negligent if it violated a federal regulation requiring informed consent. The plaintiff has changed this allegation of error between its initial brief and its "Third Brief." The initial brief, in one paragraph, claims that an instruction that a violation of 45 C.F.R. § 46 by Hutzel is evidence of negligence was "consistent with applicable case law." The third brief apparently alleges error in denying an amendment to the pre-trial order to include this theory. Either way the argument is presented, it was rendered moot by the jury's verdict.

Although Dinkins is correct that 45 C.F.R. § 46 establishes requirements for obtaining the informed consent of individuals involved in research, jury instructions to this effect would not have changed the outcome of this case. The jury returned a verdict finding Hutzel negligent on the general informed consent theory, but concluded that such negligence was not a proximate cause of Stephanie's death. It is thus pointless to consider whether another theory that also would have established negligence related to informed consent should have been presented to the jury. If there were any error, it was harmless.

V

Finally, Dinkins asserts error in the dismissal of her claim that Children's Hospital violated the federal anti-patient-dumping provisions in the Emergency Medical Treatment and Active Labor Act ("EMTLA"), 42 U.S.C. § 1395dd. Although EMTLA does prevent hospital emergency rooms from

"dumping" indigent patients, and this circuit has held that it imposes a duty of appropriately screening those who come to emergency rooms, *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 268 (6th Cir. 1990), there is absolutely no evidence of wrongdoing on the part of Children's. The *Bronson* court explained that "a discharge that to the knowledge of those conducting it left a patient with an 'emergency medical condition' in an 'unstable' condition would be actionable." *Id.* at 272. Because Stephanie's relatively rare condition was unknown to all concerned, the plaintiff cannot show either inappropriate screening or the knowing discharge of a dangerously ill individual. Children's provided entirely appropriate screening and treatment to Stephanie, given its understandable lack of knowledge of her sickle cell status.

Dinkins argues that Children's had a protocol in place that required special treatment for a child with sickle cell disease who presented with an elevated temperature, and that the hospital's failure to implement this protocol constitutes a violation of EMTLA, even though the hospital did not initiate the protocol because the staff did not know Stephanie had sickle cell disease.

There is no evidence that Children's cut any corners in failing to inquire about sickle cell. Sickle cell disease, along with many other maladies, is not a sufficiently common occurrence to warrant testing all children who present to an emergency room. The usual questions were asked, and even if the treating physician had inquired about sickle cell, he would have found out nothing from Ms. Dinkins — she did not know her daughter had the disease.

In short, all the evidence establishes that Stephanie was treated identically to any other young child that presented with

an elevated temperature. The hospital met the standard of care to the letter. The fact that this standard was inadequate to save Stephanie's life does not constitute a violation of federal law. When Children's released Stephanie, it was with the belief that it had done all that was needed to address Stephanie's needs. The plaintiff's EMTLA claim was thus defective as a matter of law and was correctly dismissed.

VI

The decision of the district court is therefore AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL DATED MAY 13, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 92-70788

TAWANDA DINKINS, Personal Representative of the Estate of STEPHANIE AMBER DINKINS, Deceased,

Plaintiff,

v.

HUTZEL HOSPITAL, a Michigan non-profit corporation, CHILDREN'S HOSPITAL OF MICHIGAN, a Michigan non-profit corporation, and THE SICKLE CELL DETECTION AND INFORMATION PROGRAM, INC., a Michigan Corporation, jointly and severally,

Defendants.

ORDER DENYING MOTION FOR NEW TRIAL

I.

Before the Court is plaintiff's motion for new trial as to defendants Hutzel Hospital (Hutzel) and Children's Hospital of Michigan (Children's) on the issue of liability. For the reasons that follow the motion is DENIED.

Appendix C

II.

A.

This is a professional malpractice action brought by the mother of Stephanie Amber Dinkins (Dinkins) who was born at Hutzel on September 25, 1986, and who died on June 10, 1990, one day after she received treatment in the emergency room at Children's. Hutzel and Children's were each charged with professional negligence along with defendant The Sickle Cell Detection And Information Program, Inc. (Sickle Cell). Following 5 days of trial, a jury found that Hutzel was professionally negligent but that its negligence was not a proximate cause of Dinkins' death. The jury found that Children's was not professionally negligent. The jury found Sickle Cell professionally negligent and assessed damages at 3 million dollars.

B.

Sometime before September 25, 1986, Hutzel voluntarily entered into an arrangement with Sickle Cell to provide blood specimens from newborns for testing by Sickle Cell for sickle cell disease and sickle cell trait. Sickle Cell, in turn, would do the tests and inform the pediatrician or the parent of the newborn of the results. Sickle Cell had federal and state grants to finance such testing and allied programs. Hutzel was the only Detroit hospital providing specimens. The arrangement was informal. Hutzel had no control over Sickle Cell and no obligation under the arrangement to do more than provide specimens. A specimen of Dinkins' blood was provided Sickle Cell; it tested positive. There was no evidence that Sickle Cell notified anybody of the test results.

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Dinkins' mother signed a generic form of consent when admitted to Hutzel and knew nothing of the Hutzel-Sickle Cell arrangement. In September, 1986, Sickle Cell testing was not commonly done in Detroit hospitals.

On June 9, 1990, Dinkins was treated in the Emergency Room at Children's for what appeared to be a bad cold. No inquiry was made of her mother relating to sickle cell disease or trait. It was not customary under Children's established protocol to inquire about sickle cell disease or trait. Dinkins was treated and sent home. She died the next day of complications from sickle cell disease. A different treatment protocol would have been followed had Children's known Dinkins had sickle cell disease.

III.

A.

After extended and contentious pretrial proceedings and several amendments to the complaint, the case went to trial. As reflected in the Joint Final Pretrial Order, the trial began on a variety of claims of liability. Essentially, Hutzel was charged with failure to obtain an informed consent, breaching a duty to ascertain and inform of the results of the testing, and having responsibility for Sickle Cell's professional negligence as its ostensible agent.

Children's was charged with failing completely and adequately to treat Dinkins, failing to refer Dinkins to a specialist, and with violation of 42 U.S.C. § 1395dd which requires equal treatment for all patients regardless of financial status.

Appendix C

B.

All of plaintiff's claims against Hutzel, except failure to inform, were dismissed prior to jury submission for reasons reflected in the record. The jury was instructed regarding Hutzel as follows:

> When I use the words "professional negligence" with respect to Hutzel Hospital, I mean the failure to do something which a reasonably careful obstetrical hospital would do or the doing of something which a reasonably careful obstetrical hospital would not do under the same or similar circumstances which existed when Tawanda Dinkins was admitted and delivered of Stephanie Dinkins. It is for you to decide what a reasonably careful obstetrical hospital would do or would not do under such circumstances.
>
> Hutzel Hospital had an obligation to follow the general practice in the medical community when obtaining Tawanda Dinkins' consent to the testing of Stephanie Dinkins' blood by the Sickle Cell Detection And Information Center, Inc.
>
> It is for you to decide what the general practices of the medical community were in 1986 regarding consent. In determining what the general practices were you may consider such items as whether or not Tawanda

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Dinkins was told that blood would be drawn and delivered to the Sickle Cell Detection And Information Center, Inc. for testing.

If you decide Hutzel Hospital followed the general practices of the medical community regarding the consent your verdict will be in favor of Hutzel Hospital.

If you determine that Hutzel Hospital failed to follow the general practices of the medical community but that such failure was not a proximate cause of the death of Stephanie Dinkins your verdict will be in favor of Hutzel Hospital.

If you determine that Hutzel Hospital failed to follow the general practices of the medical community and that such failure was a proximate cause of the death of Stephanie Dinkins your verdict will be in favor of the plaintiff.

C.

All of the claims against Children's, except failing completely and adequately to treat, were dismissed prior to jury submission for reasons reflected in the record. The jury was instructed regarding Children's as follows:

When I use the words "professional negligence", with regard to Children's Hospital, I mean the failure to follow the

existing customs and practices for hospital emergency room[s] in June of 1990, under the same or similar circumstances which existed when Stephanie Dinkins was examined and treated.

It is for you to decide, based upon the evidence, what the existing customs and practices were for hospital emergency rooms in June of 1990.

. . . . .

If you determine that Dr. Knazik [the physician who examined Dinkins] followed the custom and practice of emergency room physicians in June of 1990, your verdict will be in favor of Children's Hospital.

If you determine that Dr. Knazik failed to follow the custom and practice of emergency room physicians in June of 1990, but that such failure was not a proximate cause of the death of Stephanie Dinkins, your verdict will be in favor or Children's Hospital.

If you determine that Dr. Knazik failed to follow the custom and practice of emergency room physicians in June of 1990, and that such failure was a proximate cause of the death of Stephanie Dinkins, your verdict will be in favor or the plaintiff.

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IV.

The pending motion is predicated on the failure of the Court to instruct on the dismissed claims. The recorded reasons for dismissal of these claims is an adequate response by the Court to the motion. The transcript of these reasons is currently not available. No useful purpose would be served by trying to restate the reasons in this order. Suffice it to say, there was no evidence at trial to support a finding that Hutzel had any obligation except to obtain an informed consent from Dinkins' mother. The jury found that it failed to do so but that this failure was not a proximate cause of Dinkins' death. This finding was the jury's to make. As to Children's, the jury found it was not negligent. That again was the jury's decision to make. The federal statute, aside from getting this case into federal court, had no applicability to the facts as reflected in the evidence at trial.

V.

Sickle Cell offered no defense at trial, and has made no motion for post-trial relief. Therefore, the judgment of $3,000,000 against Sickle Cell stands.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: MAY 13 1994
Detroit, Michigan

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ENTERING JUDGMENT IN *DINKINS V. HUTZEL HOSPITAL, ET AL.* DATED MARCH 8, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CASE NUMBER: 92-70788

TAWANDA DINKINS, Representative of Estate of STEPHANIE DINKINS

Plaintiff,

V.

HUTZEL HOSPITAL, CHILDREN'S HOSPITAL OF MICHIGAN SICKLE CELL DETECTION AND INFORMATION PROGRAM,

Defendants.

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury, its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of HUTZEL HOSPITAL and and CHILDREN'S HOSPITAL OF MICHIGAN for no cause of action. FURTHER, judgment is entered in favor of the plaintiff

Appendix D

TAWANDA DINKINS and against the defendant SICKLE CELL DETECTION AND INFORMATION PROGRAM in the amount of three million dollars ($3,000,000.00)

March 8, 1994
Date

JOHN P. MAYER
Clerk

By s/ Judy Cassady
(By) Deputy Clerk JUDY CASSADY

APPENDIX E — STATUTES INVOLVED

42 U.S.C. § 1395dd(a):

§ 1395dd. Examination and treatment for emergency medical conditions and women in labor

(a) Medical screening requirement. In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this title [42 USCS §§ 1395 et seq.]) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.

* * *

42 U.S.C. § 1395(e)(1)(A):

(e) Definitions. In this section:

(1) The term "emergency medical condition" means —

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in —

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

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(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part;

* * *

APPENDIX F — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — JURY CHARGE

[Commencing at page 70]

Now when I use the words "professional negligence," with respect to Hutzel Hospital, I mean the failure to do something which a reasonably careful obstetrical hospital would do, or the doing of something which a reasonably [71] careful obstetrical hospital would not do under the same or similar circumstances. It is for you to decide what a reasonably careful obstetrical hospital, which existed when Tawanda Dinkins was admitted and delivered of Stephanie Dinkins, would do or would not do under such circumstances.

Hutzel Hospital had an obligation to follow the general practices in the medical community when obtaining Tawanda Dinkins consent to the testing of Stephanie Dinkins blood by the Sickle Cell Detection and Information Center Inc.

It is for you to decide what the general practices in the medical community were in 1986 regarding consent. In determining what the general practices were, you may consider such items as whether or not Tawanda Dinkins was told the blood would be drawn and delivered to the Sickle Cell Detection and Information Center for testing. You decide if Hutzel Hospital followed the general practices of the medical community regarding the consent, your verdict will be in favor of Hutzel Hospital. You determine that Hutzel Hospital failed to follow the general practices of the medical community, that such failure was not a proximate cause of the death of Stephanie Dinkins, your verdict again will be in favor of Hutzel Hospital. If you determine that Hutzel Hospital failed to follow the general practices of the medical community, and that such failure was a proximate [72] cause of the death of Stephanie Dinkins, your verdict will be in favor of the plaintiff.

* * *

APPENDIX G —PLAINTIFF'S PROPOSED INSTRUCTIONS TO THE JURY

* * *

SJI2D 30.01

Professional Negligence and/or Malpractice (Hutzel Hospital and Children's Hospital of Michigan)

When I use the words "professional negligence" or "malpractice" with respect to the conduct of defendants Hutzel Hospital and Children's Hospital of Michigan, I mean the failure to do something which a reasonably careful hospital would do or the doing of something which a reasonably careful hospital would not do under the same or similar circumstances you find to exist in this case. It is for you to decide what a reasonably careful hospital would do or would not do under such circumstances. *Starr v. Providence Hospital*, 109 Mich App 762 (1981)

* * *

Plaintiff's Special Jury Instruction No. 1

On of plaintiff's claims in this case is that defendant Hutzel Hospital was negligent in the manner in which it undertook to provide sickle cell disease screening for Stephanie Dinkins. In this regard, you have heard testimony that, at the time Stephanie was born, September 25, 1986, the accepted standard of hospital care did not mandate the screening of newborns for sickle cell disease. However, when a person voluntarily attempts to render a service to another, the law imposes upon that person a duty to exercise reasonable care and skill in the performance of what has been undertaken. Therefore, if you find that defendant Hutzel Hospital voluntarily undertook to obtain a sickle cell disease

screening test for Stephanie Dinkins in September of 1986, but failed to exercise reasonable care in connection with that undertaking, then I instruct you that defendant Hutzel Hospital is liable for any injuries which Stephanie Dinkins suffered as a result of the Hospital's negligence. *Sweet v. Ringwelski*, 362 Mich, 138 (1961); *Scott v. Harper Recreation*, 192 Mich App 137 (1961); *Schenk v. Mercury Marine*, 155 Mich App 20 (1986).

* * *

Plaintiff's Special Jury Instruction No. 3

In addition to her claim that Hutzel Hospital was actively negligent, plaintiff also claims that by virtue of the relationship which existed between defendant Hutzel Hospital and defendant Sickle Cell Detection And Information Program, Inc., the Sickle Cell Program was an actual or apparent agent of Hutzel Hospital for the purpose of conducting sickle cell disease screening on newborns such as Stephanie Dinkins.

Generally speaking, a principal is liable for any negligent acts of its agents, committed within the scope of the agency relationship. The test of whether an agency relationship exists depends on the right of control. Actual exercise of control is not necessary in order for you to find an agency relationship. If the right of control exists, then an agency relationship may be found.

If, in connection with Hutzel Hospital's agreement to provide blood specimens to the Sickle Cell Detection And Information Program, Inc., you find that the Hospital had a right to interfere with or control the manner in which the Sickle Cell Detection And Information Program, Inc. gave notification of its sickle cell disease test results, then you may conclude that the Sickle Cell Detection And Information Program, Inc. was an agent of defendant Hutzel Hospital for purposes of providing

such notification. Additionally, if you determine that the Sickle Cell Detection And Information Program, Inc. was negligent in failing to notify Stephanie's mother, Tawanda Dinkins, or Stephanie's pediatrician, Dr. Jorge Rose, that Stephanie had tested positive for sickle cell disease, then defendant Hutzel Hospital, as the Program's principle, is liable for such negligent acts.

Thompson-Brown Company, 67 Mich App 502 (1976); *Van Pelt v. Paull*, 6 Mich App 618 (1967)

Plaintiff's Special Jury Instruction No. 4

Even if you find that, at the time of the occurrence involved in this case, the Sickle Cell Detection And Information Center was not an actual agent of Hutzel Hospital, Hutzel Hospital may still be liable for the negligent acts of Sickle Cell Detection And Information Program, Inc. if the Sickle Cell Program was an apparent agent of Hutzel Hospital. In this regard, I instruct you that the Sickle Cell Detection And Information Program, Inc. was an apparent agent of Hutzel Hospital for the purpose of conducting sickle cell testing if the following conditions existed: (1) Tawanda Dinkins looked to Hutzel Hospital to perform all diagnostic testing on blood specimens taken from her daughter, Stephanie; (2) Tawanda Dinkins held a reasonable belief that such tests would be performed by the Hospital; (3) such belief was fostered by the Hospital; and (4) Tawanda Dinkins was not negligent in holding that belief.

Grewe v. Mt. Clemens Hospital, 404 Mich. 240 (1978).

It is for you to determine, based on the evidence you have seen and heard in this case, whether or not these conditions existed.

APPENDIX H — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — ANSWERS TO INTERROGATORIES

[Commencing at page 19]

All right. At this time, counsel wants to read to you what are known as answers to interrogatories.

In advance of the case coming up for trial, the parties, as you heard, had an opportunity to examine witnesses, because you heard a deposition of Dr. Whitten, in part. And they also had the right to put written questions to the other party and get answers. And he now wants to read to you two of the questions and the answers to them. Go ahead, sir.

MR. SMITH: Thank you, Your Honor.

First of all, question number four of Plaintiff's interrogatories that were served on Defendant Hutzel Hospital —

THE COURT: Do you want question one first?

MR. SMITH: Yes, thank, Your Honor. I'm sorry.

[20] Question one — these are answers of Defendant Hutzel Hospital to the following question:

> "1. Was any blood drawn from Stephanie Amber Dinkins for sickle cell testing, from the time of her birth on September 25, 1986, through the time of her discharge on September 27, 1986?

"Answer: Yes."

Hutzel Hospital was also asked the following question:

"4. If blood was drawn from Stephanie Dinkins for sickle cell testing, was this done as a routine testing of all black newborns?

"Answer: Yes. Please seek additional information from Charles Whitten at the Wayne State University Medical School."

Thank You.

THE COURT: Thank you. Do you have any further witnesses, sir?

MR. SMITH: We do not, Your Honor, and at this time the Plaintiff would rest.

* * *

APPENDIX I — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — MOTIONS

[Commencing at page 22]

MR. BIGLER: Your Honor, one of Plaintiff's theories is that there was an agency in this case.

THE COURT: No evidence of agency.

MR. BIGLER: Another theory, Your Honor —

THE COURT: Wait, no, I'm going to withdraw that. I'm going to withdraw that. I'm sorry, Mr. Bigler.

Hutzel answered an interrogatory which said blood was drawn and it was drawn as a routine testing of black newborns. And the answer to that is yes. And then it said see Dr. Whitten for the details.

[23] I read that as allowing an inference that Dr. Whitten and his program was the agent for Hutzel in the routine testing of newborns for sickle cell.

I apologize to you, sir.

The significance of that admission escaped me until this present moment. That's the answer that you gave. "Yes." No qualification. No equivocation. It was routine, and you should look to Dr. Whitten for the details of it.

Now, what does that make him out to be?

MR. BIGLER: Your Honor, in order to have an agent, the hallmark is control.

THE COURT: No.

MR. BIGLER: The ability to direct and control.

THE COURT: I don't — well, you can argue that he wasn't. But I'm not going to find, as a matter of law, he wasn't, in the face of that unqualified admission that Hutzel routinely tested newborns for sickle cell and that the details of the testing were with Dr. Whitten.

MR. BIGLER: Your Honor, I believe it is unfair and a gross misinterpretation of the witness — I'm sorry — of the evidence to take it in that vacuum. I think the Court has to look at all the evidence presented on the record thus far.

And there's no question but that it was routine only at Hutzel Hospital, at the acquiescence from Dr. Whitten to comply with his program. There's no question about that, and [24] it's still — we will admit that. Because of our voluntary participation in that program, it was routine to the extent that they took it from all newborns.

THE COURT: It was a special service rendered to Hutzel by black families because of the high incidence of sickle cell in black families in relationship to the total population.

MR. BIGLER: No, we weren't rendering any service. Because if we were rendering the service, then we would be testing it and reporting —

THE COURT: Oh no, that is not necessarily true.

You use outside laboratories frequently for testing, don't you?

MR. BIGLER: Very, very infrequently.

THE COURT: I don't know that. There's some small hospitals that use outside laboratories. I have tried cases called the sink tests.

Are you familiar with sink tests?

MR. BIGLER: No.

THE COURT: That is where you pour the specimen in the sink and write down the result on the chart. That is called sink testing, and you go to jail for it. No, you don't go to jail, you go to prison for it when you get caught.

But I have tried cases where sink tests were performed for hospitals, not of the size of Hutzel, but I don't know that [25] Hutzel didn't use an outsider.

Mr. Bigler, the problem is that this was a poorly administered program on the part of Hutzel, at best. At best. And you are a conscientious hospital lawyer. You would have told them or read it several different times.

MR. BIGLER: Your Honor, that still does not address the issue of agency.

THE COURT: It is a question for the jury. A question for the jury in the first instance. I am not going to sort it out. I am not going to rule as a matter of law, no, in the face of that answer to that interrogatory.

Do you have something else, sir?

MR. BIGLER: Yes. There is no ostensible agency, as a matter of law.

THE COURT: Well, I don't know what ostensible agency and agency is. Let me suggest that you two work hard on the jury instructions, and I will see how I instruct the jury. You can ask a special interrogatory to the jury, a special question on this point.

MR. BIGLER: No, because it does not get to that point, Your Honor. There has to be a holding out by a specific third person that they are acting as an agent of Hutzel Hospital. The testimony is unequivocal. She didn't know who Dr. Whitten was or the Sickle Cell Detection people until after Stephanie had actually died, let alone been discharged from

* * *

[35] only had half the case and not a full record, because then the trial judge is second-guessed. So are the parties.

I learned long ago as a trial judge, after you have invested the amount of time that has been invested in this case, it's less expensive and more cost efficient to complete the proofs, obtain the jury's view, and then deal with these questions in post-trial motions, should one or the other party feel aggrieved by the result. So, therefore, the motion for judgment, as a matter of law, vis-a-vis Hutzel will be denied without prejudice.

MR. SMITH: Thank you, Your Honor.

THE COURT: You folks have a lot of work on jury instructions and the verdict form.

Yes, Mr. Corbet, you have four motions —

MR. BIGLER: Correct, Your Honor.

THE COURT: — as I count them. Five motions.

MR. CORBET: Well, I think I have got four and then one supplemental brief.

THE COURT: Well, your motions are the federal claim, lack of probable cause, the state claim of the professional name, all claims exclusive of the failure to inquire.

MR. CORBET: Yes, that's correct.

THE COURT: Are those the motions?

MR. CORBET: Yes.

THE COURT: Okay. Let me tell you candidly, unless [36] Mr. Smith has got something, I don't see any federal law claim in this case, no evidence that they treated this child any differently than any other child, paying, nonpaying, insurance, no insurance. And as I read the federal cases, the federal statute doesn't simply federalize common law malpractice. There is state statutory malpractice. It is directed to invidious treatment.

Am I right, Mr. Smith?

MR. SMITH: Discriminatory treatment.

THE COURT: Well, that is invidious.

MR. SMITH: Yes.

THE COURT: There is no evidence here that the child was treated any differently than any other child being brought to the hospital.

MR. SMITH: The argument that I made previously is the only argument that I have now, Your Honor. And that is the fact that there was a protocol that the hospital had, certainly gave rise to an inference that at least under certain circumstances, that was the procedure that they followed.

THE COURT: Let me suggest to you that — there is no evidence in this record that if a full paying black baby — baby of a black family who was going to pay 100 percent of all the charges came in at 10 o'clock at night the way that this child came in, that that doctor would have done anything any different than he did that night.

[37] MR. SMITH: That is true, Your Honor. But that is not the standard.

First of all, the statute has nothing to do with race. What it has to do with is whether or not a hospital is diligent in routinely carrying out its protocols.

THE COURT: No, no, no. That would federalize malpractice.

No, it had — he simply said the protocol — and there is no evidence to the contrary — was not triggered until there was affirmative knowledge on the part of the hospital of the presence of sickle cell disease. Once there was a sickle cell disease diagnosed, the protocol was invoked. But there was no protocol that you have produced that said inquiry must be made at a

previous step, the determination must be made.

Your argument is that according to customary practice, inquiry must be made as to whether or not sickle cell disease was present, or there was indicia of it.

MR. SMITH: That is correct, Your Honor.

THE COURT: Then the protocol, as far as I am concerned. So I don't see anything under the federal law. So that motion is granted.

MR. SMITH: Thank you, Your Honor.

* * *

[69] * * *

THE COURT: Your previous motions are renewed?

MR. BIGLER: Yes, Your Honor.

THE COURT: They are also denied.

* * *

APPENDIX J — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — DIRECT EXAMINATION OF DR. KNAZIK

[Commencing at page 109]

* * *

Dr. Knazik, you are familiar with sickle cell disease, are you not? A. Yes, I am.

Q. And as an emergency room physician, you are aware that if a child comes into an emergency room with sickle cell disease and that child has a high fever, that if that child is not treated immediately and properly, that that child could die within 24 hours? A. Yes, I am.

Q. And as a matter of fact — as a matter of fact, doctor, Children's Hospital, in 1986, had a protocol for the treatment of children with sickle cell disease, who present with a certain temperature; is that right? [110] A. That's correct.

* * *

[114] * * *

Let me ask you this question: When Stephanie Dinkins came to the emergency room with her mother, you did not ask her mother whether or not there was a history of sickle cell disease in her family, did you? A. That's correct, I did not ask.

Q. Now, I want to direct your attention to the protocol. I f you had known that Stephanie Dinkins had sickle cell disease, you would have initiated that protocol; correct? [115] A. That's correct. If I had known that Stephanie Dinkins had sickle cell at

the time of her presentation, her entire visit would have been managed differently.

Q. Now, Dr. Knazik, you were aware that in 1986, there was no mandatory testing of newborns for sickle disease; correct? A. That's correct; in Michigan.

Q. In Michigan. A. That's correct.

Q. And so when Stephanie Dinkins came into the emergency room you didn't know, one way or the other, whether she had sickle cell disease. Is that accurate? A. That's accurate.

Q. Now, I want to talk to you about how this protocol is initiated but before I do, let me ask you this question: Would it be accurate to say, Dr. Knazik, that initiating this protocol in children with a fever of 38.5, and with sickle cell disease, was the routine procedure for Children's Hospital in June of 1990? A. Yes, that's correct.

Q. Okay, Now, let's talk about how one initiates a protocol of this type. There are two requirements for the initiation of the protocol; correct? A. That's correct.

Q. One is that the patient have a temperature of 38.5. Or higher; correct? [116] A. That's correct.

Q. Now, when a patient first comes into the emergency room, you don't know, without taking so me steps, what that child's temperature is, do you? A. That's correct.

Q. You have to do something to establish whether or not the child fits into this particular category; correct? A. For a fever, we take the child's temperature.

Appendix J

Q. Right. And you take that temperature and that let's you know that this is a child that at least fulfills one half of the protocol requirement; correct? A. It tells us that a child has a fever.

Q. And that's one half of the protocol requirement. Correct?

* * *

Q. Is it your testimony, doctor — and I do want to understand you very clearly on this point — is it your testimony that if a child comes into the Children's Hospital emergency room or if a child came into the Children's Hospital emergency room in June of 1990 and you didn't know, one way or [117] the other, whether she had sickle cell or doesn't have sickle cell, then that child is not going to be treated with this protocol under any circumstances? A. That's not entirely correct.

Q. In fact, what is correct is that you would make an effort to try to determine whether or not this is a child with sickle cell or without sickle cell; correct? A. A child of unknown status, we would make an effort to determine that by taking an adequate history as well as by doing physical examination and look for signs of a desperately ill child.

Q. And we'll be getting to that. The first thing that I want to establish is that if a child with sickle cell comes into the emergency — I'm sorry, if a child of unknown sickle cell status comes into the emergency room, you're going to try to make an effort, through your procedures, to determine whether or not this child either does or does not have sickle cell disease? A. And we do that by history.

Q. Now, let's talk about that. If a child has sickle cell in her

family, then that certainly is an historical piece of information what would be highly relevant to the determination of whether the child was sickle cell; correct? A. That's correct.

Q. But my understanding of your of your testimony is that that is not [118] something that in June of 1990 you would ask? A. That's correct, because I believe that the more sensitive marker is the child's ongoing medical history rather than the less sensitive marker of the family history, which would identify many things including the carrier trait in a family.

* * *

[123] * * *

Q. (By Mr. Smith): Dr. Knazik, would it be fair to say that if Stephanie Dinkins was about three-and-a-half years old when she came to the emergency room, then there was a better than — there was a better than 50% chance, if she had sickle [124] cell SC disease, that she would have never had any type of hospitalization up to that point in time? A. Yes, sir.

* * *

[127] * * *

Q. Would you agree with me — would you agree with me, Dr. Knazik, that when you saw Stephanie Dinkins on June the 9th of 1990, if there had been medically ascertainable facts to suggest that this child had sickle cell disease, then you would have had to either do something to rule that disease out [128] or you would have had to initiate this protocol without ruling a disease out? A. I would have made steps to ascertain whether or not this was a concern. You're correct.

Appendix J

Q. Now, Dr. Knazik, in June of 1990, there was something called the sickle cell prep test correct? A. That's correct. Which is another name for a hemoglobin solubility test.

Q. And that's a test that can be done in the emergency room; correct? A. To detect the presence of sickle cell trait.

Q. Correct. Let me finish.

You would only do that test if you suspected that the child might be suffering with sickle cell disease. Correct? In the emergency room? A. Not exclusively, no, but generally, yes.

Q. Well, that's one reason why you would do the test. Correct? A. That's correct.

Q. That test would tell you — it wouldn't tell you whether the child had sickle cell disease but it would tell you that the child might have sickle cell disease. Correct? A. That's correct.

* * *

[130] * * *

Q. Well, I'm going to try to help to clarify it. You said a great deal then. But if I understand your testimony, you're saying that if the sickle cell prep test had been positive, you would have ordered a confirmatory test, but in the meantime, you would have started the child on IV antibiotics, as required by a protocol. A. Yes, sir.

Q. What you would not have done is you wouldn't have technically admitted the patient to the hospital. A. That's correct.

Appendix J

Q. That would have been done in the emergency room area? A. Or in another observation area of the hospital. I cannot recall what we were doing in 1990 with patients who required extended observation.

Q. But the medical treatment required by the protocol would have been initiated; correct? A. That's correct.

* * *

[134] * * *

Q. I'm going to ask you to read your deposition transcript at page 60, from line 6 through line 25, and there's one word on the next page.

* * *

A. Yes, sir, I have read this.

Q. (By Mr. Smith): First of all, Dr. Knazik, did that appear to be an accurate reflection of the testimony that you gave when your deposition was taken? A. Yes, sir.

Q. And was that true at the time your deposition was taken? A. Yes, sir.

Q. And is that true now? A. Yes, sir.

Q. Now, Dr. Knazik, you were asked the following question.

> "Do you believe that the fact that she [135] had never had surgery enabled you to rule out the possibility of sickle cell SC?"

Appendix J

And then you gave the following answer —

* * *

Q. (By Mr. Smith): Was this your answer, Dr. Knazik:

> "The tests are — the physical exam — Excuse me. Let me restate that. The physical exam and the historical questions are taken in toto and are not designed specifically to elicit information regarding hemoglobin SC. They're also designed to elicit information regarding, for example, seizures, asthma, diabetes, kidney problems, and other abnormalities that children sometimes have that requires special medical care in the pediatric emergency department."

Is that accurate, doctor? A. Yes sir.

* * *

APPENDIX K — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — DIRECT EXAMINATION OF DR. WHITTEN

[Commencing at page 62]

* * *

Q. Okay. Now, this — By the way, this program that we're talking about was a program in which you did need to have informed consent in order to do this type of testing; is that accurate? A. Yes.

Q. You would not have taken specimens if no one had consented that you do so; correct? A. We were using the informed consent — regular informed consent of the hospital.

Q. Of Hutzel Hospital? A. Of Hutzel Hospital.

Q. Okay. But informed consent was a necessary part of this process, as far as you were concerned, was it not? A. Yes, with the — we used the informed consent of the hospital.

Q. And I'm not disputing that. A. Okay.

Q. I just want to be clear that informed consent was a necessary part of this process. A. That's correct.

Q. And as a matter of fact, on page 3 of your exhibit, it [63] says, "cord blood screening" — As a matter of fact, I should read the heading of subparagraph G, which is "Procedures for Obtaining Informed Consent." Do you see that? A. Yes, I do.

Q. And under subparagraph 3, "cord blood screening," it says routine hospital consent form is used; correct? A. That's correct.

Appendix K

Q. Did you have any control over the consent form that was used by Hutzel Hospital? A. No.

Q. You didn't draft that form, did you? A. I did not.

Q. You didn't tell them what type of form to use? A. I did not.

Q. But it was your understanding that whatever consent form they did use would have been adequate for you to do the work that you were doing? A. That's correct.

Q. And how did you reach that conclusion, that the informed consent form that Hutzel Hospital was using was adequate? A. Because I felt whatever consent form that permitted them to carry out normal procedures in the care of patients was adequate for this purpose.

Q. Was it your opinion that this constituted routine patient care as opposed to research? [64] A. Yes, I thought this would be helpful to patients.

Q. So it was your opinion that if a patient had consented to routine care, that that particular consent would be adequate to enable you to do the sickle cell screening that you were doing? A. That's correct.

Q. Because in your opinion that would have been a reasonable and appropriate part of patient care? A. That's correct.

Q. Now, Dr. Whitten, I want you to assume for a moment that under the Code of Federal Regulations, this cord blood screening program that you were conducting at Hutzel Hospital was, in

fact, a research project, that it was research within the meaning of the regulations. A. That's an assumption you want me to make?

Q. Yes, I want you to make that assumption. And I believe you've already indicated that if it was research, then Hutzel Hospital would have been a cooperative institution within the meaning of Section 46.114. A. That's correct.

Q. Now, do you have any knowledge or information, Dr. Whitten, as to whether or not Hutzel Hospital told Tawanda P. Dinkins that this was a research project and what the purpose of that project was? A. I have no knowledge of that, no.

Q. Do you have any knowledge as to whether or not Hutzel Hospital told Tawanda Dinkins anything regarding the benefits that she might derive from such a research project? A. I have no knowledge.

THE COURT: Is it a fair statement, doctor, that you have no knowledge whatsoever of what Hutzel told anybody?

THE WITNESS: That's correct.

THE COURT: What?

THE WITNESS: That's correct.

THE COURT: Okay.

Q. (By Mr. Smith): Do you know whether or not Hutzel Hospital has an institutional review board? A. I assume they do. I don't know specifically, no.

Q. Do you know whether or not this program that you had adopted was ever submitted by Hutzel Hospital to its own institutional review board? A. I have no knowledge.

Q. Now, Dr. Whitten, you've already indicated that Hutzel Hospital provided you with the specimens that you used for sickle cell screening. A. That's correct.

Q. But they did more than that, did they not? They actually secured the consent that you were operating under; correct? A. Yes, I assume they did.

Q. Because you had no contact with —

[66] THE COURT: Wait, wait. What's your answer?

THE WITNESS: I assume that they did.

Q. (By Mr. Smith): You had no direct contact with subjects? For example, you never met Tawanda Dinkins. I believe you already testified to that. A. No, I didn't.

Q. And you relied upon the hospital to make sure that an adequate consent was obtained? A. That's correct.

Q. Now, would it be accurate to say, Dr. Whitten, that if the hospital had requested that you send results back to the hospital, that you would have acquiesced in that request? A. I would have.

Q. That you would have complied with that request? A. I would have.

Q. And if Hutzel Hospital, as part of the arrangement, had

requested that you forward notification to the parents, you would have complied with that request? A. I would have.

Q. And the reason — And as a matter of fact, Dr. Whitten, you would have complied with any reasonable request regarding the testing procedures that were utilized in this program, that were made by Hutzel Hospital? A. Reasonable requests, yes.

Q. And the reason you would have complied with reasonable [67] request is because without Hutzel Hospital, there would have been no program; is that correct? A. That's correct.

* * *

APPENDIX L — CHILDREN'S HOSPITAL'S PROTOCOL FOR EMERGENCY ROOM TREATMENT OF PATIENTS WITH SICKLE CELL DISEASE AND FEVER

PROTOCOL FOR EMERGENCY ROOM TREATMENT OF PATIENTS WITH SICKLE CELL DISEASE AND FEVER

TEMPERATURE 38^5 ORAL

1. **HISTORY AND PHYSICAL**

2. A CBC with differential, retic count, blood culture, urinalysis, urine culture and chest x-ray should done. If clinically indicated, a lumbar puncture may be performed.

3. **PATIENTS WITHOUT A FOCUS:**

   Age: ≤ 6 years - IV Cefuroxime 150 mg/kg/day divided q 8^0 - maximum 6 gms/day

   Age: ≥ 6 years - IV Penicillin 200,000 units per/kg/day divided q 4^0

   The first dose of antibiotic should be given prior to sending the patient to X-ray.

4. **PATIENTS WITH A FOCUS:**

   Age: ≤ 6 years - Admit and treat with appropriate antibiotics.

   Age: ≥ 6 years - Clinical judgement to be used to decide about hospitalization.

   The first dose of antibiotic should be given prior to sending the patient to X-ray.

Appendix L

ALL PATIENTS WITH PNEUMONIA SHOULD BE ADMITTED.

5. If evidence of septic shock (wide pulse pressure and poor peripheral perfusion) or evidence of clinic deterioration, patient should be started on IV Cefuroxime plus gram negative coverage. Sulocortef, 5mg/kg may be indicated. Exchange transfusion and ICU admission should be considered and consultation with the Hematology Service is indicated.

APPENDIX M — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — DIRECT EXAMINATION OF DR. LUBIN

[Commencing at page 189]

* * *

Q. Dr. Lubin, have you served as consultant to the National Institute of Health? A. Yes, I do.

Q. And can you tell the jury when you first became consultant to N.I.H.? A. Well, essentially I began working with people at N.I.H. from the time I started at the University of Pennsylvania. If you're to be involved in research activities in the Medical Center, the only source of funding is N.I.H. so you have to write application to the N.I.H. and initial efforts in sickle cell were not under an N.I.H. program, but they were under another wing of Health and Human Services to establish a sickle cell screening and education program at Children's Hospital in Oakland, so eventually I became a member of the N.I.H. program and now I have a member of the executive committee of the Sickle Cell Branch in the N.I.H. which involves both basic and clinical research activities and review of applications that deal with basic and clinical activities of sickle cell anemia.

Q. Now Doctor, you mentioned the term I.R.B.? [190] A. Yes.

Q. Can you first of all just tell the jury what that is? A. I.R.B. refers to an Institutional Review Board. The Institutional review Board is composed of people within the Medical Center as well as often times people outside the Medical Center.

If I were to start a newborn screening program, I would write a protocol and have an informed consent form in it and submit it

to this Institutional Review Board. They, just as you function in a case like a jury for the research, is this something that should be done, is there value, are the rights of the person who signed this protected, does the form spell out in detail enough that the person who signs it understands what they're actually doing, and will the information that's obtained from this research be conveyed by the person who participates in it.

Q. Now, in a situation such as the one that we have been discussing where you have a sickle cell program as a non-profit group working with a hospital, what is the hospitals responsibility in the scheme of things that you have just described? A. In my opinion it's the hospital, the hospital has the Institutional review Board, it is the hospitals [191] patients that are participating.

Q. Now Doctor, based upon the materials that you have reviewed in this case and based upon your education, training and experience as well as your familiarity with the N.I.H. and its funding requirements, did you find anything in the records that indicated to you that Hutzel Hospital had set up a an Institutional Review Board to approve the program that was later apparently carried out by Dr. Whitten? A. The question would be better did they have an Institutional Review Board, they have to as part of the Medical Center therein. The question is whether a protocol related to this was ever reviewed by that Institutional Review Board, and I found no evidence in any of the documents that I read that such a procedure had taken place.

Q. Did you find any evidence in any of the materials that you have reviewed which indicted, Dr. Lubin, that there were some type of forms requiring consent from the individuals who were participating? A. No.

Appendix M

Q. Did you find anything to indicate that there was some type of procedure to insure that the participants would be informed of the results of the testing? A. No.

* * *

[218] * * *

Q. (By Mr. Smith, continuing:) Dr. Lubin, based upon your education training and experience, do you have an opinion which you hold with a reasonable degree of scientific certainty as to whether or not Hutzel Hospital had an obligation to inform Tawada Dinkins that the Sickle Cell Testing program was being conducted at Hutzel Hospital and that her child was a participant in that program? [219] A. My opinion is they had a responsibility to inform her of that.

Q. What is the basis of your opinion? A. My opinion is that in any type of testing that doesn't involve immediate implementation of care and is again part of a research program, people should have the right to have that the testing done and should know how the results will be conveyed to them.

* * *

[239] * * *

Q. You reviewed Dr. Knazik's deposition; did you not? A. Yes, I did.

Q. What is your understanding of Dr. Knazik's knowledge whether this child had sickle cell disease or not? A. My understanding is that he did not inquire nor did he know this child had sickle cell disease.

Appendix M

Q. Based upon your education, training and experience, do you have an opinion as to whether or not his failure to do that breached the accepted standard of emergency medicine care that existed on June 9, 1990? A. In my opinion and at our hospital a child new to the medical profession, they did not have a medical record to demonstrate that testing or a history had been taken, that a history would have to be taken in relationship to sickle cell anemia in an Afro-American child.

Q. Would failure to do that in your opinion breech the [240] standard of emergency medical care? A. Yes, it would.

* * *

[256] * * *

Q. Dr. Lubin, with respect to the care and treatment that Dr. Knazik rendered to Stephanie Dinkins on June 9, 1990, you have testified that you believe that his treatment did not meet the accepted standard of care. My question now is: Do you have an opinion as to whether or not it would have made a difference in the outcome of this case if his treatment had met the accepted or recognized standard of emergency medicine care? A. Yes, I do.

Q. Could you tell the jury what that opinion is? A. I believe that if an inquiry had been made to Stephanie's mother as to the history of sickle cell, the doctor would have ordered blood tests and would have been able to make a diagnosis and then would have implemented this protocol, and had this been done —

* * *

Appendix M

[257] THE WITNESS: And had that been done, it is my opinion should be alive today.

* * *

[346] * * *

BY MR. SMITH:

Q. Dr. Lubin, during the cross-examination, Mr. Bigler asked you a question regarding the standard of care for a hospital such as in your case, Alta Bates, and I believe the question was to the effect that was the standard of care or is it true that the standard of care for a hospital such as this was not to notify the patient of the results because I believe you had testified that in the case of Alta Bates, the notification procedure was carried out by the laboratory doing the test; is that right? A. That's correct.

Q. You were about to say something in addition to that. I believe you started by saying the standard of care did require, and what I'd like for you to tell the jury now is what did the standard of care require under the circumstances where a hospital was drawing blood and sending it to a laboratory for testing? A. The standard of care demanded that the hospital protected the rights of their patients that were in that hospital and in that protection was that a procedure was in place to notify that patient or the [347] patient and the patients physician of the results.

Q. Did the hospital drawing the blood in the case that you were discussing, did that hospital review the procedures that were being followed to notify appropriate persons? A. They would not have approved doing this in the first place had that not been in the keeping of the standard of care.

Appendix M

Q. As I understand your testimony, that is a part of the standard of care that was not met in this case? A. That's my opinion.

* * *

APPENDIX N —HUTZEL HOSPITAL FORMS: CONSENT FOR ADMISSION AND RELEASE OF TREATMENT INFORMATION

HUTZEL HOSPITAL
CONSENT FOR ADMISSION

❑ Hutzel Hospital
❑ Hutzel Hospital Center — Warren

PATIENT: _____

DATE: _____ TIME: _____ a.m._____p.m.

1. Knowing that I (or _____) have (has) a condition requiring hospital care and medical treatment, I do hereby voluntarily consent to such routine diagnostic procedures and hospital care as are deemed necessary, and to such medical treatment by Dr. _____ , his assistants or designees (herein called the "physician") as is deemed necessary in his or their judgment.

2. I consent to the administration of drugs and such routine therapeutics as may be ordered by the physician, his assistants or designees.

3. In connection with certain routine diagnostic tests, I understand that specimens of blood, urine, and other bodily fluids tissues or products may be obtained and that routine tests will be performed on such fluids, tissues and products, and I consent to the same. I further authorize Hutzel Hospital to perform such other tests and procedures on any such bodily fluids, tissues or product as it deems appropriate to further medical research and knowledge.

Appendix N

4. I consent to the administration of blood, blood plasma or blood products if deemed necessary by the physicians, with the full realization that complications (including but not limited to hepatitis) may sometimes result inherently and unavoidably from the receipt of blood, plasma or other blood components. Emergencies may arise wherein it may not be possible to make the cross-matching or other test that would otherwise be made, and wherein it may be necessary to use blood that is not of the most compatible type. I understand that I (the patient) assumes all the risks in the above respects, and I (the patient) hereby agree to assume such risks.

5. I understand that I am (the patient is) to have the usual and ordinary care practiced by physicians and surgeons in the community and that no other specific contract, written or implied, is made.

NOTE: I (the patient) hereby certify that the form was completed and any inappropriate paragraphs or phrases, if any, were stricken before I affixed my signature.

Signature of Patient
or Patient's Representative s/ Tawanda Dinkins

WITNESS: s/ Kmarriatt RNC

(If this form was signed in the physician's office prior to hospital admission, complete the following:)

Date: ___ _____ Time: _____

Appendix N

I certify that I have previously signed a copy of this document, that the signature which appears thereon is my own, and that the consent given therein remains in full force and effect and represents my present wishes. I (the patient) hereby certify that the form was completed any any inappropriate paragraphs or phrases, if any, were stricken before I affixed my signature.

NAME: _____

The patient or the same person who signed for the patient should complete this part of the form.

WITNESS: Signature _____ Title _____

NOTE: Consent to Release of Information to Third Party Payers — printed on back of this form.

Appendix N

HUTZEL HOSPITAL

RELEASE OF TREATMENT INFORMATION

I authorize Hutzel Hospital, its Medical Director or other authorized employees to release any and all information contained in my medical record, including substance abuse information protected under 42 Code of Federal Regulations, Part 2 (if any) and social services and psychological service information including communications made by me to a social worker or psychologist (if any) to:

a. _____
(insert name of known insurers or third party payers)

or any other insurers or third party payers which may be responsible in whole or in part for payment of my hospital treatment (without limitation, Blue Cross/Blue Shield, Medicare, Medicaid, Automobile No-Fault Insurers, Workers Disability Compensation Insurers, Commercial Health Insurers, and Health Maintenance) for the purpose of Hutzel Hospital's obtaining payment or reimbursement for my care: and

b. _____
(insert name of known follow-up or physician or health care facility)

or any other physician or health care facility for the purpose of facilitating continuity of my health care.

With respect to information released to insurers, or third party payers, this authorization shall remain effective only as long as

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reasonably necessary for Hutzel Hospital to receive payment or reimbursement for health care services rendered to me. With respect to information released to physicians or health care facilities, this authorization shall remain in effect so long as I am being treated by such physicians or health care facilities. In respect to any substance abuse information protected by 42 Code of Federal Regulation, Part 2 (if any) I may revoke this authorization earlier except to the extent that Hutzel Hospital has already released information or taken other action in reliance upon this authorization.

Date 9-25-86 Signature s/ Tawanda Dinkins

Witness: s/ Kmarriatt RNC

APPENDIX O — EXCERPTED JOINT FINAL PRETRIAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN DATED FEBRUARY 16, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 92-70788
Judge Avern Cohn

TAWANDA DINKINS, Personal Representative of the Estate of STEPHANIE AMBER DINKINS, Deceased,

Plaintiff,

vs.

HUTZEL HOSPITAL, a Michigan non-profit corporation, THE SICKLE CELL DETECTION AND INFORMATION PROGRAM, INC., a Michigan corporation, and CHILDREN'S HOSPITAL OF MICHIGAN, a Michigan non-profit corporation, jointly and severally,

Defendants.

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JOINT FINAL PRE-TRIAL ORDER

1. Jurisdiction

Plaintiff's complaint against defendant Children's Hospital asserts a cause of action under 42 USC 1395dd (the federal anti-patient dumping statute). Although this action was originally filed in state court, pursuant to 28 USC 1441(b), on February 13, 1992, defendant Children's Hospital removed the case to the United States District Court for the Eastern District of Michigan, Southern Division. The basis of the Court's jurisdiction is 28 USC 1331. Jurisdiction in this case is uncontested.

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2. Plaintiff's Statement Of Claim

Hutzel Hospital

Stephanie Dinkins was born at Hutzel Hospital on September 25, 1986. Following Stephanie's birth, the Hospital referred Stephanie's mother to Dr. Jorge Rose, a pediatrician on the staff of Hutzel Hospital. The Hospital also delivered a specimen of Stephanie's blood to the Sickle Cell Detection And Information Program, Inc. for sickle cell disease testing. Stephanie's blood specimen was delivered to the Sickle Cell Detection And Information Program, Inc. without the knowledge or consent of Stephanie's mother, Tawanda Dinkins.

Plaintiff in this case claims that Hutzel Hospital was actively negligent in two respects. First, the Hospital failed to inform Tawanda Dinkins that a specimen of her daughter's blood was being released to the Sickle Cell Detection And Information Program, Inc., for sickle cell disease testing. Second, defendant Hutzel Hospital violated its duty to ascertain the results of Stephanie's sickle cell disease screening test and failed to communicate the positive test results to Stephanie's mother, or Stephanie's pediatrician. Plaintiff claims that if either Stephanie's mother, or Stephanie's pediatrician had been notified of Stephanie's sickle cell disease, they would have taken precautions which would have saved Stephanie's life.

In addition to the active negligence of Hutzel Hospital, plaintiff also claims that Hutzel Hospital is responsible for the negligent conduct of the Sickle Cell Detection And Information Program, Inc. In this regard, plaintiff claims that, by virtue of an agreement reached in 1977, the Sickle Cell Detection And Information Program, Inc. became an actual or apparent agent of

Hutzel Hospital for the purpose of conducting sickle cell disease testing on children born at Hutzel Hospital. Plaintiff further claims that since the Sickle Cell Program was an actual or apparent agent of Hutzel Hospital for the purpose of conducting newborn sickle cell testing, Hutzel Hospital is liable for the Program's negligent failure to communicate the results of Stephanie's sickle cell test to Stephanie's mother or Stephanie's pediatrician.

Sickle Cell Detection And Information Program, Inc.

With respect to defendant Sickle Cell Detection And Information Program, Inc., plaintiff claims that the Sickle Cell Program negligently failed to communicate Stephanie's positive sickle cell test to Stephanie's mother, and Stephanie's pediatrician.

Children's Hospital Of Michigan[1]

With respect to defendant Children's Hospital of Michigan, plaintiff claims that Children's Hospital, through its agents, was negligent on June 9, 1990, in several respects. First, Children's Hospital failed to take a complete and adequate medical history in order to determine whether Stephanie was experiencing complications of sickle cell disease. Second, the Hospital's emergency physician, Dr. Knazik, failed to refer Stephanie to a specialist even though he knew, or should have known, he was not competent to properly evaluate Stephanie's condition. Third,

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1. Defendant Children's Hospital objects to plaintiff's reference to the Hospital's treatment "protocol" on the grounds that treatment protocols are irrelevant to the issues in this case. Children's Hospital also objects to claim that it failed to refer the child to a specialist.

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Children's Hospital failed to conduct appropriate diagnostic tests, including a sickle cell screening test, in order to rule out sickle cell disease. Finally, in violation of federal law, the Hospital discharged Stephanie home without initiating its standard treatment protocol for children with sickle cell disease. Plaintiff claims that the foregoing omissions were significant contributing factors in the death of Stephanie Dinkins.